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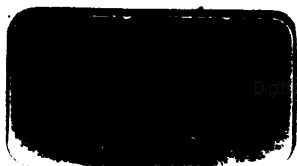
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MASSACHUSETTS REPORTS
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CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MARCH 1894 — JUNE 1894

GEORGE F. TUCKER
REPORTER

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.

HON. CHARLES ALLEN.

HON. OLIVER WENDELL HOLMES, JR.

HON. MARCUS P. KNOWLTON.

HON. JAMES M. MORTON.

HON. JOHN LATHROP.

HON. JAMES M. BARKER.

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

TABLE

OF THE CASES REPORTED.

Alden <i>v.</i> Hart	576	Boston & Maine Railroad	
Allen <i>v.</i> Evans	485	(Felt <i>v.</i>)	311
Almy (Niles <i>v.</i>)	29	—— (Nealand <i>v.</i>)	67
Ames <i>v.</i> Sheehan	274	Boston Electric Light Co. (Hec-	
Anthony <i>v.</i> Anthony	343	tor <i>v.</i>)	558
Appleton (Shaw <i>v.</i>)	313	—— (Illingsworth <i>v.</i>)	583
Baker (Hewins <i>v.</i>)	320	Boston Tow-Boat Co. (Watts	
Bangs (Hunnewell <i>v.</i>)	132	<i>v.</i>)	378
—— (Perry <i>v.</i>)	35	Boulester <i>v.</i> Parsons	182
—— (Southard <i>v.</i>)	35	Brelsford (Commonwealth <i>v.</i>)	61
Barnes <i>v.</i> Barnes	381	Bride <i>v.</i> Clark	130
Bartlett (Burlingame <i>v.</i>)	593	Briggs (Willard <i>v.</i>)	58
Barton (Radcliffe <i>v.</i>)	327	Brookline (Lynch <i>v.</i>)	302
Batchelder <i>v.</i> Hutchinson	462	Brown <i>v.</i> Nealley	1
Bates (Pratt <i>v.</i>)	315	Bryant (Weber <i>v.</i>)	400
Bertie <i>v.</i> Flagg	504	Buckley <i>v.</i> Old Colony Railroad	26
Bicknell <i>v.</i> New York & New		Burbank <i>v.</i> Sweeney	490
England Railroad	428	Burgess (McAlister <i>v.</i>)	269
Bigelow <i>v.</i> West End Street		Burkhardt <i>v.</i> Yates	591
Railway	393	Burlingame <i>v.</i> Bartlett	593
Biggerstaff <i>v.</i> Marston	101	Burtis <i>v.</i> Burtis	508
Bingham <i>v.</i> Boston	3	Buswell <i>v.</i> Fuller	220
Bishop <i>v.</i> Eaton	496	—— <i>v.</i> Supreme Sitting of	
Blatt <i>v.</i> McBarron	21	the Order of the Iron Hall	224
Boston (Bingham <i>v.</i>)	3	Buzzell <i>v.</i> Emerton	176
—— (Cotton <i>v.</i>)	8	Cahill <i>v.</i> Hall	512
—— (Farrell <i>v.</i>)	106	Cambridge (New York Biscuit	
—— (Garrity <i>v.</i>)	530	Co. <i>v.</i>)	326
—— (Hennessy <i>v.</i>)	502	Cape Ann Granite Co. (Mer-	
—— (Sampson <i>v.</i>)	288	rill <i>v.</i>)	212
—— (Titus <i>v.</i>)	209	Carew <i>v.</i> Stubbs	294
Boston & Albany Railroad <i>v.</i>		Carpenter (Jacobs <i>v.</i>)	16
Charlton	32	Cazneau <i>v.</i> Fitchburg Railroad	355
—— (Wilder <i>v.</i>)	387	Charlton (Boston & Albany	
Boston & Lockport Block Co.		Railroad <i>v.</i>)	32
(Roughan <i>v.</i>)	24	Chase (Durr <i>v.</i>)	40

Chelsea (Pettingell v.)	368	Fitchburg Railroad (Webster v.)	298
Cheney v. Middlesex Co.	296	—— (Wright v.)	145
Cheshire Railroad (Hale v.)	443	Flagg (Bertie v.)	504
Citizens' Gas Light Co. of Reading, South Reading, & Stoneham v. Wakefield	432	Flanders (North Brookfield Savings Bank v.)	335
Clark (Bride v.)	130	Forbes (Lynch v.)	302
Collins v. Kennedy	440	Foss (Kilroy v.)	138
Commonwealth v. Brelsford	61	Freeman (Sawyer v.)	543
—— v. Early	186	Fuller (Buswell v.)	220
—— (Lane v.)	120		
—— v. McManus	64	Garham v. Mutual Aid Society	357
—— v. Suffolk Trust Co.	550	Garrity v. Boston	530
—— v. Sullivan	59	Glover (McKim v.)	418
—— v. Warren	281	Goddard v. McIntosh	253
—— v. Williams	442	Grace (Putnam v.)	237
Consolidated Adjustable Shoe Co. (Wiggin v.)	597	Graham (Fenton v.)	554
Cotton v. Boston	8		
Crabtree (Norcross v.)	55	Hale v. Cheshire Railroad	44
Creed v. Creed	107	—— (McGuerty v.)	5
Cummings v. Stearns	506	—— (Wardwell v.)	396
Cutter (Dresser v.)	301	Hall (Cahill v.)	512
		Hanson (Wheeler v.)	370
Deering (Kalleck v.)	469	Hart (Alden v.)	576
Dewey v. Peeler	135	Heavor v. Page	109
Donahue v. Parkman	412	Hector v. Boston Electric Light Co.	558
Doyle v. West End Street Railway	533	Hennessey v. Boston	502
Dresser v. Cutter	301	Hewins v. Baker	320
Durr v. Chase	40	Hodgson (Raymond v.)	184
Dwelling-House Ins. Co. (Rothrock v.)	423	Hoitt (Hosmer v.)	173
		Holst v. Stewart	516
Early (Commonwealth v.)	186	Horne v. Old Colony Railroad	180
Eaton (Bishop v.)	496	Hosmer v. Hoitt	173
Emerton (Buzzell v.)	176	Hoyt (Marsh v.)	459
Employers' Liability Assurance Co. (People's Ice Co. v.)	122	Hudson Real Estate Co. v. Tower	10
Evans (Allen v.)	485	Hunnewell v. Bangs	132
		Hutchinson (Batchelder v.)	462
Faist (King v.)	449	—— (Simpson v.)	462
Farrell v. Boston	106	Hyde (Miller v.)	472
Feely v. Pearson Cordage Co.	426		
Felt v. Boston & Maine Railroad	311	Iasigi v. Iasigi	75
Fenton v. Graham	554	Illingsworth v. Boston Electric Light Co.	583
Fenwick (Mulcahy v.)	164	International Trust Co. v. Wilson	80
Fitchburg Railroad (Cazneau v.)	355		
—— (Robbins v.)	145	Jacobs v. Carpenter	16
—— (Sullivan v.)	125	Jones (O'Hare v.)	391
		Joy v. Metcalf	514

Kalleck v. Deering	469	New York & New England Railroad (Bicknell v.)	428
Keane v. Old Colony Railroad	203	—— (Norwood v.)	259
Keene v. New England Mutual Accident Association	149	New York Biscuit Co. v. Cambridge	326
Kelley v. Kelley	111	Neylon (O'Gara v.)	140
Kennedy (Collins v.)	440	Niles v. Almy	29
Kilroy v. Foss	138	Norcross v. Crabtree	55
King's case	46	North (Peabody v.)	525
King v. Faist	449	North Brookfield Savings Bank v. Flanders	335
Kittredge v. Osgood	384	Norwood v. New York & New England Railroad	259
Lane v. Commonwealth	120	O'Brien v. Rideout	170
Linnehan (Twomey v.)	91	O'Gara v. Neylon	140
Little v. Little	188	O'Hare v. Jones	391
Littlehale v. Osgood	340	Old Colony Railroad (Buckley v.)	26
Lockett (Meservey v.)	332	—— (Horne v.)	180
Loomis (Ryder v.)	161	—— (Keane v.)	203
Lynch v. Brookline	302	—— v. Rockland & Abington Street Railway	416
—— v. Forbes	302	—— (Thain v.)	353
McAlister v. Burgess	269	Order of the Iron Hall (Buswell v.)	224
McBarron (Blatt v.)	21	Osgood (Kittredge v.)	384
McGuerty v. Hale	51	—— (Littlehale v.)	340
McIntosh (Goddard v.)	253	Page (Heavor v.)	109
McKim v. Glover	418	Parkman (Donahue v.)	412
McManus (Commonwealth v.)	64	Parsons (Boulester v.)	182
Maney v. Providence & Worcester Railroad	283	Peabody v. North	525
Marsh v. Hoyt	459	Pearson Cordage Co. (Feely v.)	426
Marston (Biggerstaff v.)	101	Peeler (Dewey v.)	135
Mathews v. Providence & Worcester Railroad	283	People's Ice Co. v. Employers' Liability Assurance Co.	122
Matthews (Pfeiffer v.)	487	Perry v. Bangs	35
Mercantile Mutual Accident Association (Piper v.)	589	Pettingell v. Chelsea	368
Merrill v. Cape Ann Granite Co.	212	Pfeiffer v. Matthews	487
Meservey v. Lockett	332	Piper v. Mercantile Mutual Accident Association	589
Metcalf (Joy v.)	514	Pratt v. Bates	315
Middlesex Co. (Cheney v.)	296	—— v. Pratt	276
Miller v. Hyde	472	Providence & Worcester Railroad (Maney v.)	283
Monaghan v. Putney	338	—— (Mathews v.)	283
Mulcahy v. Fenwick	164	Putnam v. Grace	237
Mutual Aid Society (Garham v.)	357	Putney (Monaghan v.)	338
Nealand v. Boston & Maine Railroad	67	Radclyffe v. Barton	327
Nealley (Brown v.)	1	Raymond v. Hodgson	184
Needham (Watson v.)	404		
New England Mutual Accident Association (Keene v.)	149		

Rice (<i>Zinn v.</i>)	571	Thain <i>v.</i> Old Colony Railroad	353
Rideout (<i>O'Brien v.</i>)	170	Titus <i>v.</i> Boston	209
Robbins <i>v.</i> Fitchburg Railroad	145	Tower (Hudson Real Estate Co. <i>v.</i>)	10
Rockland & Abington Street Railway (Old Colony Rail- road <i>v.</i>)	416	Twomey <i>v.</i> Linnehan	91
Rockport (Rockport Water Co. <i>v.</i>)	279	Wakefield (Citizens' Gas Light Co. of Reading, South Read- ing, & Stoneham <i>v.</i>)	432
Rockport Water Co. <i>v.</i> Rock- port	279	Wardwell <i>v.</i> Hale	396
Rooney <i>v.</i> Sewall & Day Cord- age Co.	153	Wares, petitioner	70
Rothrock <i>v.</i> Dwelling-House Ins. Co.	423	Warren (Commonwealth <i>v.</i>)	281
Roughan <i>v.</i> Boston & Lockport Block Co.	24	Watson <i>v.</i> Needham	404
Ryder <i>v.</i> Loomis	161	—— <i>v.</i> Wyman	96
Sampson <i>v.</i> Boston	288	Watts <i>v.</i> Boston Tow-Boat Co.	378
Sawyer <i>v.</i> Freeman	543	Weber <i>v.</i> Bryant	400
Sewall & Day Cordage Co. (Rooney <i>v.</i>)	153	Webster <i>v.</i> Fitchburg Railroad	298
Shaw <i>v.</i> Appleton	313	West End Street Railway (Big- elow <i>v.</i>)	393
Sheehan (Ames <i>v.</i>)	274	—— (Doyle <i>v.</i>)	533
Simpson <i>v.</i> Hutchinson	462	Wheeler <i>v.</i> Hanson	370
Smith (Williams <i>v.</i>)	248	Wiggin <i>v.</i> Consolidated Adjust- able Shoe Co.	597
Southard <i>v.</i> Bangs	35	Wilder <i>v.</i> Boston & Albany Railroad	387
Stearns (Cummings <i>v.</i>)	506	Wiley <i>v.</i> Wiley	446
Stewart (Holst <i>v.</i>)	516	Willard <i>v.</i> Briggs	58
Stillings <i>v.</i> Young	287	Williams (Commonwealth <i>v.</i>)	442
Stubbs (Carew <i>v.</i>)	294	—— <i>v.</i> Smith	248
Suffolk Trust Co. (Common- wealth <i>v.</i>)	550	Wilson (International Trust Co. <i>v.</i>)	80
Sullivan (Commonwealth <i>v.</i>)	59	Wright <i>v.</i> Fitchburg Railroad	145
—— <i>v.</i> Fitchburg Railroad	125	Wyman (Watson <i>v.</i>)	96
Supreme Sitting of the Order of the Iron Hall (Buswell <i>v.</i>)	224	Yates (Burkhardt <i>v.</i>)	591
Sweeney (Burbank <i>v.</i>)	490	Young (Stillings <i>v.</i>)	287
		Zinn <i>v.</i> Rice	571

TABLE OF CASES

CITED BY THE COURT.

Adams v. Broughton, 2 Strange, 1078	481	Balch v. Shaw, 7 Cush. 282	136
— v. —, Andrews, 18	481	Baldwin v. Baldwin, 6 Gray, 341	112
Agricultural Branch Railroad v. Winchester, 13 Allen, 29	445	Ballou v. Billings, 136 Mass. 307	456
A. Heaton, The, 43 Fed. Rep. 592	471	Baltimore & Ohio Railroad v. Baugh, 149 U. S. 368	470
Ahrend v. Odiorne, 118 Mass. 261	245	Baltimore Traction Co. v. State, 28 Atl. Rep. 397	801
Allen v. Allen, 100 Mass. 373	119	Barker v. Haskell, 9 Cush. 218	175
— v. G. W. & F. Smith Iron Co. 160 Mass. 557	470	— v. Walsh, 14 Allen, 172	331
Amidon v. Benjamin, 126 Mass. 276	466	Barrell, Ex parte, L. R. 10 Ch. 512	413
Andrews v. Aetna Ins. Co. 92 N. Y. 596	439	Barrett v. Vaughan, 6 Vt. 243	331
— v. Clerke, Carth. 25	302	Bartholomew v. St. Louis, Jacksonville, & Chicago Railroad, 53 Ill. 227	68
Arnold v. Richmond Iron Works, 1 Gray, 434	482	Barton v. Radclyffe, 149 Mass. 275	828
Ashuelot Boot & Shoe Co. v. Hoit, 56 N. H. 548	14	Bassett v. Connecticut River Railroad, 145 Mass. 129	69
Atkins v. Chilson, 11 Met. 112	134	Batchelder, petitioner, 147 Mass. 465	548
Atlas Bank v. Nahant Bank, 23 Pick. 480	386	Beach v. First Methodist Episcopal Church, 96 Ill. 177	14
Atlas National Bank v. Savary, 127 Mass. 75	89	Belcher v. Chambers, 53 Cal. 635	118
Attorney General v. Boston & Albany Railroad, 160 Mass. 62	265	Bellamy v. Debenham, 45 Ch. D. 481	252
— v. Federal Street Meeting-House, 3 Gray, 1	271	Bennett v. Hood, 1 Allen, 47	476
— v. Old South Society, 13 Allen, 474	271	Benson v. Goodwin, 147 Mass. 237	471
— v. Trinity Church, 9 Allen, 422	271	— v. Gray, 164 Mass. 391	125
Atwater v. Tupper, 45 Conn. 144	474	Bentley v. Ward, 116 Mass. 383	596
Atwood v. Atwood, 22 Pick. 283	318	Best v. Hammond, 12 Ch. D. 1	414
— v. Cobb, 16 Pick. 227	162	Beverly Bank v. Wilkinson, 2 Gray, 519	556
Auburn Bolt & Nut Works v. Shultz, 143 Penn. St. 256	15	Bigelow v. Bemis, 2 Allen, 496	143
Avery v. United States, 12 Wall. 304	381	— v. Norris, 139 Mass. 12	20
Babcock v. Bryant, 12 Pick. 133	500	— v. —, 141 Mass. 14	20
— v. Western Railroad, 9 Met. 563	389	Biscope v. White, Cro. Eliz. 759	22
Bacon v. McIntire, 8 Met. 57	350	Bish v. Johnson, 21 Ind. 299	445
Badenfeld v. Massachusetts Accident Association, 154 Mass. 77	150	Bishop v. Brainerd, 28 Conn. 289	445
Bailey v. Hervey, 136 Mass. 172	479	— v. Montague, Cro. Eliz. 824	480
Baker v. Fales, 16 Mass. 488	271	Bissell v. Kip, 5 Johns. 89	136
Balch v. Pickering, 164 Mass. 363	81	Blake's case, 106 Mass. 501	50
		Blake v. Blanchard, 48 Maine, 297	136
		— v. Langdon, 19 Vt. 485	217
		Blanchard v. Blanchard, 1 Allen, 223	461
		Blaney v. Blaney, 1 Cush. 107	546
		Blasdel v. Souther, 6 Gray, 149	456
		Bliss v. Franklin, 13 Allen, 244	377
		— v. New York Central & Hudson River Railroad, 160 Mass. 447	476

Bliss v. Nichols, 12 Allen, 443	329	Buckland v. Johnson, 15 C. B. 145	481
Blumantle v. Fitchburg Railroad, 127 Mass. 322	70	Budd v. New York, 143 U. S. 517	265
Blunk v. Atchison, Topeka, & Santa Fe Railroad, 38 Fed. Rep. 311	376	Buñinch v. Winchenbach, 3 Allen, 161	288
Bolton v. Lambert, 41 Ch. D. 295	439	Bullard v. Chandler, 149 Mass. 532	403
Boom Co. v. Patterson, 98 U. S. 403	309	— v. Moor, 158 Mass. 418	421
Borst, In re, 11 Nat. Bankr. Reg. 96	556	Bump v. Commonwealth, 8 Met. 533	122
Boss v. Providence & Worcester Railroad, 15 R. I. 119	28	Burbridge v. Mannors, 3 Camp. 193	99
Boston & Albany Railroad v. Charlton, 161 Mass. 32	376	Burdon v. Massachusetts Safety Fund Association, 147 Mass. 300	231, 365
Boston & Maine Railroad v. Cambridge, 8 Cush. 237	389	Burgess v. Keyes, 108 Mass. 43	528
— v. County Commissioners, 79 Maine, 386	265	Burnell v. New York Central Railroad, 45 N. Y. 184	68
Boston & Worcester Railroad v. Dana, 1 Gray, 83	524	Burnham v. Morrissey, 14 Gray, 226	49
Boston Investment Co. v. Boston, 158 Mass. 461	326	Burr v. Leicester, 121 Mass. 241	532
Bostwick v. Bass, 99 Mass. 469	288	Bursley v. Hamilton, 15 Pick. 40	477
Boulester v. Parsons, 161 Mass. 182	185	Burtis v. Burtis, Hopk. Ch. 557	115
Bowler v. Bowker, 148 Mass. 198	31	Bush v. Hovey, 124 Mass. 217	301
Boylston Market Association v. Boston, 113 Mass. 528	264	Buswell v. Eaton, 76 Maine, 392	186
Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228	383	— v. Order of the Iron Hall, 161 Mass. 224	367
Brackett v. Winslow, 17 Mass. 153	331	Butler v. Hildreth, 5 Met. 49	479
Bradley v. Jamison, 46 Iowa, 68	118	Butman v. Porter, 100 Mass. 357	247
Brady v. Fall River, 121 Mass. 262	532	Butterworth v. Western Assurance Co. 132 Mass. 489	295
Braiden v. Mercer, 44 Ohio St. 339	422	Call v. Hagger, 8 Mass. 423	143
Braintree Water Supply Co. v. Braintree, 146 Mass. 482	279	Callender v. Marsh, 1 Pick. 418	531
Brandenburg v. Thorndike, 139 Mass. 102	547	Cambridge Institution for Savings v. Littlefield, 6 Cush. 210	20
Brett v. Brett, 5 Met. 233	511	Campbell v. Phelps, 1 Pick. 62	481
Brettun v. Fox, 100 Mass. 234	278	Cape v. Stoughton, 16 Gray, 364	96
Brewer v. Norcross, 2 C. E. Green, 219	217	Carey v. Boston & Maine Railroad, 158 Mass. 228	161
Brickett v. Haverhill Aqueduct Co. 142 Mass. 394	280	Carkin v. Savory, 14 Gray, 528	501
Brinsmead v. Harrison, L. R. 6 C. P. 584	479	Carleton v. Akron Sewer Pipe Co. 129 Mass. 40	179
— v. —, L. R. 7 C. P. 547	474	Carpenter v. Longan, 16 Wall. 271	99
Bristol, Cardiff, & Swansea Aërated Bread Co. v. Maggs, 44 Ch. D. 616	252	Cartwright v. Dickinson, 88 Tenn. 476	14
Bristol County Savings Bank v. Keavy, 128 Mass. 298	338	Catton v. Bennett, 51 L. T. (N. S.) 70	413
Brooks v. Curtis, 50 N. Y. 639	486	Cawthorne v. Knight, 11 Ala. 268	136
Broult v. Hanson, 158 Mass. 17	335	Central Bridge Co. v. Lowell, 15 Gray, 106	329
Brown's case, 152 Mass. 1	122	Chace v. Brooks, 5 Cush. 43	501
Brown v. Chicago, Rock Island, & Pacific Railway, 69 Iowa, 161	354	Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544	211
— v. Dunham, 11 Gray, 42	528	— v. New York, New Haven, & Hartford Railroad, 159 Mass. 589	343
— v. Leach, 107 Mass. 364	522	— v. Railroad Commissioners, 141 Mass. 208	328
— v. Lowell, 8 Met. 172	532	Charlestown v. County Commissioners, 1 Allen, 199	
— v. South Boston Savings Bank, 148 Mass. 300	184	Cheever v. Wilson, 9 Wall. 110	
— v. Wootton, Cro. Jac. 78	481	Chicago & Iowa Railroad v. —, 91 Ill. 298	
— v. —, Moore, 762	481	Chicago, Burlington, & Quincy Road v. Iowa, 94 U. S. 153	
— v. —, Yelv. 67	481	Chicago, Milwaukee & St. Paul Railway v. Ross, 100 U. S. 234	
Bryan v. Bates, 12 Allen, 201	49	Chicago, Rock Island & Pacific Railroad v. Fairclough, 100 U. S. 234	
Bryant v. Isburgh, 13 Gray, 607	580	Childress v. Fox, 100 Mass. 357	247
— v. Johnson, 24 Maine, 304	332	Chisholm v. Olney, 100 Mass. 3	
Buck v. Wolcott, 13 Gray, 268	50		

Bliss v. Nichols, 12 Allen, 443	329	Buckland v. Johnson, 15 C. B. 145	481
Blumantle v. Fitchburg Railroad, 127 Mass. 322	70	Budd v. New York, 143 U. S. 517	265
Blunk v. Atchison, Topeka, & Santa Fe Railroad, 38 Fed. Rep. 311	376	Bulfinch v. Winchenbach, 3 Allen, 161	288
Bolton v. Lambert, 41 Ch. D. 295	439	Bullard v. Chandler, 149 Mass. 532	408
Boom Co. v. Patterson, 98 U. S. 403	309	— v. Moor, 158 Mass. 418	421
Borst, In re, 11 Nat. Bankr. Reg. 96	556	Bump v. Commonwealth, 8 Met. 533	122
Boss v. Providence & Worcester Railroad, 15 R. I. 149	28	Burbridge v. Manners, 3 Camp. 193	90
Boston & Albany Railroad v. Charlton, 161 Mass. 82	876	Burdon v. Massachusetts Safety Fund Association, 147 Mass. 360	231, 365
Boston & Maine Railroad v. Cambridge, 8 Cush. 237	389	Burgess v. Keyes, 108 Mass. 43	528
— v. County Commissioners, 79 Maine, 386	265	Burnell v. New York Central Railroad, 45 N. Y. 184	68
Boston & Worcester Railroad v. Dana, 1 Gray, 83	524	Burnham v. Morrissey, 14 Gray, 226	49
Boston Investment Co. v. Boston, 158 Mass. 461	326	Burr v. Leicester, 121 Mass. 241	532
Bostwick v. Bass, 99 Mass. 469	288	Bursley v. Hamilton, 15 Pick. 40	477
Boulester v. Parsons, 161 Mass. 182	185	Burtis v. Burtis, Hopk. Ch. 557	115
Bowker v. Bowker, 148 Mass. 108	81	Bush v. Hovey, 124 Mass. 217	301
Boylston Market Association v. Boston, 113 Mass. 528	264	Buswell v. Eaton, 76 Maine, 392	186
Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228	383	— v. Order of the Iron Hall, 161 Mass. 224	367
Brackett v. Winslow, 17 Mass. 153	331	Butler v. Hildreth, 5 Met. 49	479
Bradley v. Jamison, 46 Iowa, 68	118	Butman v. Porter, 100 Mass. 337	247
Brady v. Fall River, 121 Mass. 262	532	Butterworth v. Western Assurance Co. 132 Mass. 489	295
Braiden v. Mercer, 44 Ohio St. 839	422	Call v. Hagger, 8 Mass. 423	143
Braintree Water Supply Co. v. Braintree, 146 Mass. 482	279	Callender v. Marsh, 1 Pick. 418	531
Brandenburg v. Thorndike, 139 Mass. 102	547	Cambridge Institution for Savings v. Littlefield, 6 Cush. 210	20
Brett v. Brett, 5 Met. 233	511	Campbell v. Phelps, 1 Pick. 62	481
Brettun v. Fox, 100 Mass. 234	278	Capen v. Stoughton, 16 Gray, 364	96
Brewer v. Norcross, 2 C. E. Green, 219	217	Carey v. Boston & Maine Railroad, 158 Mass. 228	161
Brickett v. Haverhill Aqueduct Co. 142 Mass. 394	280	Carkin v. Savory, 14 Gray, 528	501
Brinsmead v. Harrison, L. R. 6 C. P. 584	479	Carleton v. Akron Sewer Pipe Co. 129 Mass. 40	179
— v. —, L. R. 7 C. P. 547	474	Carpenter v. Longan, 16 Wall. 271	99
Bristol, Cardiff, & Swansea Aërated Bread Co. v. Maggs, 44 Ch. D. 616	252	Cartwright v. Dickinson, 88 Tenn. 476	14
Bristol County Savings Bank v. Keavy, 128 Mass. 298	338	Catton v. Bennett, 51 L. T. (N. S.) 70	413
Brooks v. Curtis, 50 N. Y. 639	486	Cawthorne v. Knight, 11 Ala. 268	136
Broult v. Hanson, 158 Mass. 17	335	Central Bridge Co. v. Lowell, 15 Gray, 106	329
Brown's case, 152 Mass. 1	122	Chace v. Brooks, 5 Cush. 43	501
Brown v. Chicago, Rock Island, & Pacific Railway, 69 Iowa, 161	354	Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544	211
— v. Dunham, 11 Gray, 42	528	— v. New York, New Haven, & Hartford Railroad, 159 Mass. 529	343
— v. Leach, 107 Mass. 364	522	— v. Railroad Commissioners, 141 Mass. 208	268
— v. Lowell, 8 Met. 172	532	Charlestown v. County Commissioners, 1 Allen, 199	389
— v. South Boston Savings Bank, 148 Mass. 300	184	Cheever v. Wilson, 9 Wall. 108	511
— v. Wootton, Cro. Jac. 78	481	Chicago & Iowa Railroad v. Russell, 91 Ill. 298	354
— v. —, Moore, 762	481	Chicago, Burlington, & Quincy Railroad v. Iowa, 94 U. S. 155	265
— v. —, Yelv. 67	481	Chicago, Milwaukee, & St. Paul Railway v. Ross, 112 U. S. 377	472
Bryan v. Bates, 12 Allen, 201	49	Chicago, Rock Island, & Pacific Railroad v. Fairclough, 52 Ill. 106	68
Bryant v. Ishburgh, 13 Gray, 607	580	Childress v. Fowler, 9 Ark. 159	802
— v. Johnson, 24 Maine, 304	332	Chisholm v. Old Colony Railroad, 159 Mass. 3	542
Buck v. Wolcott, 13 Gray, 268	50		

Ciriack v. Merchants' Woolen Co. 146 Mass. 182	53, 160	Commonwealth v. Welsh, 110 Mass. 359	64
— v. —, 151 Mass. 162	160	— v. Whitney, 10 Pick. 434	49
Claffin v. Boston & Lowell Railroad, 7 Allen, 341	581	— v. Wilson, 1 Gray, 837	107
— v. Claffin, 149 Mass. 19	399	— v. Wolcott, 110 Mass. 67	188
Clark v. Eastern Railroad, 189 Mass. 423	69	Conant v. Burnham, 133 Mass. 508	876
— v. Gordon, 121 Mass. 330	593	Conlon's case, 148 Mass. 168	50
Clarke's case, 12 Cush. 320	49	Connecticut River Railroad v. County Commissioners, 127 Mass. 50	280
Cleveland Rolling Mill v. Rhodes, 121 U. S. 255	580	Connihan v. Thompson, 111 Mass. 270	482
Cobb v. Kempton, 154 Mass. 266	421	Connolly v. Waltham, 156 Mass. 868	869
Codman v. Hall, 9 Allen, 335	593	Conroy v. Clinton, 158 Mass. 818	869
Coe v. Washington Mills, 149 Mass. 543	232, 364	Cooke v. Birt, 5 Taunt. 765	23
Coffin v. Dunham, 8 Cush. 404	112	Coombe v. Sansom, 1 Dowl. & Ry. 201	481
— v. Ewer, 5 Met. 228	332	Coombs v. New Bedford Cordage Co. 102 Mass. 572	160
Collins v. Martin, 1 B. & P. 648	100	Cooper v. London, Brighton, & South Coast Railway, 4 Ex. D. 88	414
Columbian Book Co. v. De Golyer, 115 Mass. 67	386	Corcoran v. Boston & Albany Railroad, 133 Mass. 507	343
Commerce, The, 1 Black, 574	471	Corthell v. Egery, 74 Maine, 41	136
Commissioners on Inland Fisheries v. Holyoke Water Power Co. 104 Mass. 446	266	Cotterill v. Starkey, 8 C. & P. 691	335
Commonwealth v. Adams, 160 Mass. 310	282	Coullard v. Tecumseh Mills, 151 Mass. 85	160, 297
— v. Anthes, 12 Gray, 29	63	Cowen v. Sunderland, 145 Mass. 363	506
— v. Bentley, 97 Mass. 551	64	Cox v. Hakes, 15 App. Cas. 506	51
— v. Blood, 97 Mass. 538	118	Crain v. Paine, 4 Cush. 483	324
— v. Bloss, 116 Mass. 56	63	Creamer v. West End Street Railway, 156 Mass. 320	395
— v. Boston & Lowell Railroad, 134 Mass. 211	27	Cross v. Cross, 108 N. Y. 628	113
— v. Boston & Maine Railroad, 129 Mass. 500	28, 301	Crowley v. Pacific Mills, 148 Mass. 228	160
— v. Brickett, 8 Pick. 138	49	Cullen v. Cullen, 18 N. Y. St. Rep. 381	118
— v. Brigham, 147 Mass. 414	376	Cummings v. Arnold, 3 Met. 486	456
— v. Caponi, 155 Mass. 534	443	— v. Bramhall, 120 Mass. 552	507
— v. Chandler, 11 Mass. 83	49	Cummingtown v. Belchertown, 149 Mass. 223	113
— v. Coolidge, 138 Mass. 193	283	Currier v. Bartlett, 122 Mass. 133	136
— v. Cushing, 11 Mass. 67	49	— v. Howard, 14 Gray, 511	324
— v. Cutler, 153 Mass. 252	388	Cushing v. Worrick, 9 Gray, 382	286
— v. Dana, 2 Met. 329	64	Cutler v. Tufts, 3 Pick. 272	314
— v. Dearborn, 109 Mass. 368	188	Cutter v. Davenport, 1 Pick. 82	352
— v. Deegan, 138 Mass. 182	443	— v. Hamlen, 147 Mass. 471	506
— v. Downes, 24 Pick. 227	49	Cutting v. Daigneau, 151 Mass. 297	90
— v. Eastern Railroad, 103 Mass. 254	265		
— v. Finnerty, 148 Mass. 162	208	Dana v. Gill, 5 J. J. Marsh. 242	280
— v. Gormley, 133 Mass. 580	443	— v. Kemble, 17 Pick. 545	524
— v. Gould, 158 Mass. 499	443	Danbury Cornet Band v. Bean, 54 N. H. 624	367
— v. Greene, 13 Allen, 251	318	Davenport v. Tilton, 10 Met. 320	886
— v. Harrison, 11 Mass. 63	49	Davis's case, 122 Mass. 324	50
— v. Hazeltine, 108 Mass. 479	63	Davis v. County Commissioners, 153 Mass. 218	263
— v. Irwin, 1 Allen, 587	22	— v. Estey, 8 Pick. 475	233
— v. Kendrick, 147 Mass. 444	64	— v. Galloupe, 111 Mass. 121	125
— v. Lambert, 12 Allen, 177	283	Davol v. Davol, 13 Mass. 264	112
— v. McMahon, 133 Mass. 394	376	Daves v. Head, 3 Pick. 128	233
— v. McShane, 110 Mass. 502	63	Debinson v. Emmons, 158 Mass. 592	102
— v. Meserve, 156 Mass. 61	443	Dempsey v. Chambers, 154 Mass. 830	439
— v. O'Hearn, 132 Mass. 553	60	Denison v. Lincoln, 131 Mass. 236	183
— v. Quin, 5 Gray, 478	22	Dennan v. Gould, 141 Mass. 16	20
— v. Reynolds, 120 Mass. 190	64	Denning v. Corwin, 11 Wend. 647	118
— v. Ryan, 157 Mass. 403	64	Dent v. Ferguson, 132 U. S. 50	8
— v. Tibbetts, 157 Mass. 519	49		
— v. Waite, 2 Pick. 445			

Depree v. Bedborough, 4 Giff. 479	413	Ferren v. Old Colony Railroad, 143 Mass. 197	354
De Souza v. Stafford Mills, 156 Mass. 476	160, 297	Firth v. Denny, 2 Allen, 468	546
Dewey v. Field, 4 Met. 381	477	Fisher v. Attleborough School District, 4 Cush. 494	309
Dingley v. Boston, 100 Mass. 544	211	— v. Boston, 104 Mass. 87	869
Dingman v. Myers, 13 Gray, 1	331	— v. New York & New England Railroad, 185 Mass. 107	285
Ditson v. Ditson, 4 R. I. 87	511	Fisk v. Fitchburg Railroad, 158 Mass. 238	354
Dodd v. Ponsford, 6 C. B. (N. S.) 324	280	Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155	259
Dodge v. Boston & Bangor Steamship Co. 148 Mass. 207	300	Flynn v. Campbell, 160 Mass. 128	470
Doherty v. Hill, 144 Mass. 465	162	Fogg v. United Order of the Golden Lion, 166 Mass. 431	363
Dorgan v. Boston, 12 Allen, 223	264, 308	Folger v. Columbian Ins. Co. 99 Mass. 267	119, 232, 365
Doty v. Gorham, 5 Pick. 487	569	Foster v. Waterman, 124 Mass. 592	119
Dow v. Whitney, 147 Mass. 1	100	Foxall v. Barnett, 2 El. & Bl. 928	376
Dowell v. General Steam Navigation Co. 5 El. & Bl. 195	472	Frank v. Hoey, 128 Mass. 263	681
Downey v. Sawyer, 157 Mass. 418	53, 298	Frank & Willie, The, 45 Fed. Rep. 494	471
Downs v. Flanders, 150 Mass. 92	59	Freeman v. Travelers' Ins. Co. 144 Mass. 572	150
Drake, Ex parte, 5 Ch. D. 866	474	Freeman's National Bank v. Savery, 127 Mass. 75	89
Drake v. Mitchell, 8 East, 251	475	French v. Connecticut River Lumber Co. 145 Mass. 261	877
Duncan v. Preferred Accident Association, 27 Jones & Spen. 145	152	— v. Merrill, 132 Mass. 525	163
Dunklee v. Crane, 103 Mass. 470	466	Frost v. Grand Trunk Railroad, 10 Allen, 387	28
Dunn v. Sargent, 101 Mass. 336	508	Fry v. Charter Oak Ins. Co. 31 Fed. Rep. 197	236
Durfee v. Old Colony & Fall River Railroad, 5 Allen, 230	445	Furgeson v. Jones, 17 Oregon, 204	118
Duval v. Wellman, 124 N. Y. 156	3	Furness v. Fox, 1 Cush. 184	399
Dwinnells v. Parsons, 98 Mass. 470	893	Gale v. Blaikie, 126 Mass. 274	466
Eastern Railroad v. Boston & Maine Railroad, 111 Mass. 125	308	Galing v. Galing, 4 Lana. 473	119
Eastman v. Perkins, 10 Cush. 249	376	Galpin v. Page, 18 Wall. 350	113
Edmunds v. Hill, 133 Mass. 445	477	Gardner v. Hooper, 3 Gray, 398	508
Ehrgott v. Mayor, &c. of New York, 96 N. Y. 264	377	— v. Lane, 9 Allen, 492	581
Ehrman v. Teutonia Ins. Co. 1 McCrary, 128	425	— v. —, 12 Allen, 39	581
— v. —, 1 Fed. Rep. 471	425	Garrett v. Dillsburg & Mechanicburg Railroad, 78 Penn. St. 465	15
Eldridge v. Eldridge, 9 Cush. 516	399	— v. Tinnen, 7 How. (Miss.) 465	302
Elliott v. Hayden, 104 Mass. 180	329	Gates v. Campbell, 8 Cush. 104	557
Elmer v. Fessenden, 151 Mass. 359	574	George v. Wood, 9 Allen, 80	105
Elwell v. Cumner, 136 Mass. 102	20	Georgia Pacific Railway v. Davis, 92 Ala. 300	354
Ely v. McKay, 12 Allen, 323	247	Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174	265
Embury v. Conner, 3 Comst. 511	118	Gibbens v. Gibbens, 140 Mass. 102	462
Emery v. Boston Ins. Co. 138 Mass. 898	456	Gifford v. Dartmouth, 129 Mass. 135	83
Erkenbrach v. Erkenbrach, 96 N. Y. 466	116	Gilbert v. Guild, 144 Mass. 601	53
Essex v. Daniell, L. R. 10 C. P. 538	414	Gillaspie v. Clark, 1 Tenn. 2	302
Fall River Iron Works v. Old Colony & Fall River Railroad, 5 Allen, 221	309	Gilman v. Gilman, 126 Mass. 26	424
Faneuil Hall Ins. Co. v. Liverpool, London, & Globe Ins. Co. 153 Mass. 63	376	Glover's case, 109 Mass. 340	50
Farnham v. Pierce, 141 Mass. 203	71	Goldthwait v. Haverhill & Groveland Street Railway, 160 Mass. 554	354
Farwell v. Mather, 10 Allen, 322	162	Goodnow v. Walpole Emery Mills, 146 Mass. 261	160
Faxon v. Baxter, 11 Cush. 35	331	Goodrich v. Willard, 11 Gray, 880	331
Fay v. Cheney, 14 Pick. 399	489	Goodyear Dental Vulcanite Co. v. Caduc, 144 Mass. 85	479
— v. Guynon, 131 Mass. 31	377	Gorman v. Russell, 14 Cal. 531	867
— v. Wenzell, 8 Cush. 315	136		
Felch v. Hooper, 119 Mass. 52	163		
Felt v. Boston & Maine Railroad, 161 Mass. 311	343		
Ferlat v. Gojon, Hopk. Ch. 478	115		

Gott v. Dinsmore, 111 Mass. 45	306	Holt v. Stewart, 154 Mass. 445	521
Graham v. North Eastern Railway, 18 C. B. (N. S.) 229	354	Holt v. Somerville, 127 Mass. 408	308
Gray v. Gray, 150 Mass. 56	595	Holyoke Co. v. Lyman, 15 Wall. 500	206
— v. Larrimore, 2 Abb. U. S. 542	118	Hooker v. Olmstead, 6 Pick. 481	482
Griffin v. Griffin, 47 N. Y. 134	115	Howe v. Cambridge, 114 Mass. 388	284
Grimes v. Kimball, 3 Allen, 518	522	— v. Smith, 27 Ch. 1. 89	413
Grimoldby v. Wells, L. R. 10 C. P. 391	580	Howes v. Newcomb, 146 Mass. 76	518
Grover v. Flye, 5 Allen, 543	100	Howland v. Maynard, 159 Mass. 484	298
Guild v. Bonnemort, 156 Mass. 522	110	Hubbard v. Hamilton Bank, 7 Met. 840	282, 355, 886
Hackett v. Middlesex Manuf. Co. 101 Mass. 101	139	Huckins v. Hunt, 138 Mass. 306	8
— v. Potter, 135 Mass. 349	114	Hudson Real Estate Co. v. Tower, 156 Mass. 82	11
Hafford v. New Bedford, 16 Gray, 297	293, 369	Hull v. Mitcheson, 64 N. Y. 639	114
Hale v. Cheney, 159 Mass. 268	161	Hunnewell v. Bangs, 161 Mass. 182	315
Hall v. Cushing, 9 Pick. 395	202	Hunt v. Johnson, 44 N. Y. 27	114
Hanchett v. Briscoe, 22 Beav. 496	163	— v. Loucks, 38 Cal. 372	137
Hand v. Brookline, 126 Mass. 324	411	Hunter v. Farren, 127 Mass. 481	377
Hannon v. Williams, 7 Stew. 255	217	Hurley v. Brown, 98 Mass. 545	162
Hanscom v. Boston, 141 Mass. 242	7	Hussey v. Horne-Payne, 4 App. Cas. 811	252
Harding v. Alden, 9 Greenl. 140	511	Hutchins v. State Bank, 12 Met. 421	352
Harris v. Mountjoy, 2 Leon. 173	802	Ingalls v. Hobbs, 156 Mass. 848	843
— v. White, 81 N. Y. 532	112	— v. Ingalls, 150 Mass. 57	595
Harteau v. Harteau, 14 Pick. 181	511	International Fair & Exposition Association v. Walker, 88 Mich. 886	14
Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221	426	Jackson v. Anderson, 4 Wend. 474	186
Harvey v. Harris, 112 Mass. 32	581	— v. Phillips, 14 Allen, 589	271
Haskins v. Hawkes, 108 Mass. 379	489	James v. Woodruff, 10 Paige. 541	218
Hastings v. Lovejoy, 140 Mass. 261	456	Jenks v. Turpin, 18 Q. B. D. 505	282
— v. Mace, 157 Mass. 499	141	Jennings v. Philadelphia & Reading Railroad, 23 Fed. Rep. 569	236
Hathaway v. Tinkham, 148 Mass. 85	185	Johanson v. Boston & Maine Railroad, 163 Mass. 57	148
Hawes v. Waltham, 18 Pick. 451	288	Johns v. Church, 12 Pick. 557	477
Hawkes v. Pike, 105 Mass. 560	383	Johnson v. Berkshire Ins. Co. 4 Allen, 388	151
Hayes v. Hyde Park, 153 Mass. 514	574	— v. Boston Tow-Boat Co. 135 Mass. 209	470
— v. Wilson, 105 Mass. 21	524	— v. Day, 17 Pick. 106	187
Hayford v. Everett, 68 Maine, 505	136	— v. Leigh, 6 Taunt. 246	28
Head v. Cole, 53 Ark. 523	99	— v. St. Paul, Minneapolis, & Manitoba Railway, 43 Minn. 52	354
Heatherly v. Hadley, 4 Oregon, 1	118	Jones v. Kelly, 17 Mass. 115	49
Hector v. Boston Electric Light Co. 161 Mass. 558	585	Journey v. Gardner, 11 Cush. 355	557
Hedley v. Pinkney & Sons Steamship Co. [1892] 1 Q. B. 53	471	Joy v. Boston Penny Savings Bank, 115 Mass. 60	486
Heebner v. Eagle Ins. Co. 10 Gray, 131	295	Julia Fowler, The, 49 Fed. Rep. 277	471
Henry v. King Philip Mills, 155 Mass. 361	160	Kabley v. Worcester Gas Light Co. 102 Mass. 392	598
Hepburn v. Sewell, 5 Har. & J. 211	481	Kelley, petitioner, 152 Mass. 432	50, 71
Hill v. Boston, 122 Mass. 344	293, 369	Kelley v. Meins, 135 Mass. 231	495
Hills v. Parker, 111 Mass. 508	386	Kellogg v. Dickinson, 147 Mass. 432	350
Hinton v. Sparkes, L. R. 3 C. P. 161	413	Kelly v. Thompson, 101 Mass. 291	413
Hittinger v. Westford, 135 Mass. 258	326	Kendall v. Weaver, 1 Allen, 277	295
Hobbie v. Jennison, 149 U. S. 355	599	Kennebec Co. v. Augusta Ins. & Banking Co. 6 Gray, 204	456
Høger v. Chicago, Milwaukee, & St. Paul Railway, 63 Wis. 100	68	Kenney v. Brown, 139 Mass. 345	20
Hoffman v. Hoffman, 55 Barb. 269	119	— v. Habich, 187 Mass. 421	95
Holbrook v. American Ins. Co. 6 Paige, 220	217	Kernohan v. Durham, 48 Ohio St. 1	99
Holden v. Fitchburg Railroad, 129 Mass. 268	26	Kerrigan, petitioner, 158 Mass. 220	50
— v. Upton, 134 Mass. 177	338	Kidwelly Canal Co. v. Raby, 2 Price, 93	13
Holderby v. Walker, 3 Jones Eq. 46	547		
Holmes v. Broughton, 10 Wend. 75	117		
— v. Turner's Falls Co. 150 Mass. 535	351		

Kilborn v. Lyman, 6 Met. 299	386	Lynde v. Parker, 155 Mass. 481	513
Kincaid v. Brunswick School District, 11 Maine, 188	309	Lyon v. Jerome, 26 Wend. 485	310
King, The, v. Rogier, 1 B. & C. 272	282	McConologue's case, 107 Mass. 154	50
— v. —, 2 Dowl. & Ry. 431	282	McCormick v. Fiske, 138 Mass. 379	331
— v. Taylor, 3 B. & C. 502	282	McFarlane v. Williams, 107 Ill. 33	593
Kingsbury's case, 106 Mass. 223	50	Mackay v. Holland, 4 Met. 69	477
Kittredge v. Osgood, 161 Mass. 384	865	McKeon v. Cutter, 156 Mass. 296	506
Kline v. Baker, 99 Mass. 253	131	McKimble v. Boston & Maine Railroad, 139 Mass. 542	28
Knapp v. Knapp, 134 Mass. 353	119	Macknet v. Macknet, 9 C. E. Green, 277	547
Ladd v. New Bedford Railroad, 119 Mass. 412	26	McLaughlin v. Nichols, 13 Abb. Pr. 244	118
Lafayette Ins. Co. v. French, 18 How. 404	425	Magner v. Renk, 65 Wis. 364	376
Lafond v. Deems, 81 N. Y. 507	367	Maine v. Cumston, 98 Mass. 317	486
Lamb v. Bowser, 7 Biss. 315	426	Manchester v. Searle, 121 Mass. 418	466
Lamine v. Dorrell, 2 Ld. Raym. 1216	481	Manning v. Sprague, 148 Mass. 18	515
Lane v. Holman, 145 Mass. 221	179	Marble Co. v. Ripley, 10 Wall. 339	247
— v. Moore, 151 Mass. 87	208	Marlett v. Jackman, 3 Allen, 287	14
Lawless v. Reagan, 128 Mass. 592	47	Marshall v. Betner, 17 Ala. 832	876
Lawrence's case, 18 Abb. Pr. 347	118	— v. Hosmer, 4 Mass. 60	302
Lawrence v. Hagerman, 56 Ill. 68	876	Martin v. Gleason, 139 Mass. 183	286
— v. Stearns, 11 Pick. 501	95	— v. Richards, 155 Mass. 381	506
Lazell v. Lazell, 8 Allen, 575	278	Mason v. Massa, 122 Mass. 477	88
Lea v. Whitaker, L. R. 8 C. P. 70	414	Massachusetts General Hospital v. Fairbanks, 132 Mass. 414	529
Leach v. Wilbur, 9 Allen, 212	377	Massachusetts Iron Co. v. Hooper, 7 Cush. 183	218
Learnard v. Bailey, 111 Mass. 160	180	Mathews v. Sharp, 99 Penn. St. 560	414
Learock v. Putnam, 111 Mass. 499	398	Matteson v. Strong, 159 Mass. 497	185
Lee v. Whitney, 149 Mass. 447	91	Max Morris, The, 137 U. S. 1	472
Le Forest v. Tolman, 117 Mass. 109	185	May v. Shumway, 10 Gray, 86	49
Lerned v. Wannemacher, 9 Allen, 412	456	Mayer v. People, 80 N. Y. 364	208
Levi v. Brooks, 121 Mass. 501	574	Maynard v. Buck, 100 Mass. 40	257
Lewis v. Avery, 8 Vt. 287	136	— v. Maynard, 10 Mass. 456	383
— v. Jewell, 151 Mass. 345	523	Mayor, &c. of Worcester v. Norwich & Worcester Railroad, 109 Mass. 103	265
— v. Weston-Super-Mare Local Board, 40 Ch. D. 55	309	Mead v. Parker, 115 Mass. 418	162
Libbey v. Staples, 39 Maine, 166	598	Mendon v. County Commissioners, 5 Allen, 13	72
Lindsey v. Parker, 142 Mass. 582	84	Merchants' Bank v. Shouse, 102 Penn. St. 488	219
Little v. Cook, 1 Aik. 368	832	Merchants' National Bank v. Bange, 102 Mass. 295	581
Littlefield v. Boston & Albany Railroad, 146 Mass. 268	285	Mercier v. Chace, 11 Allen, 194	278
Lloyd v. Ogleby, 5 C. B. (N. S.) 667	335	Merriam v. Bayley, 1 Cush. 77	20
Lord v. Bigelow, 124 Mass. 185	475	— v. Simonds, 121 Mass. 198	508
— v. Edwards, 148 Mass. 476	581	Merrick v. Amherst, 12 Allen, 500	264
Loring v. Alden, 3 Met. 576	456	— v. Plumley, 99 Mass. 506	207
— v. Boston, 7 Met. 409	15	Merrigan v. Boston & Albany Railroad, 154 Mass. 189	148
— v. Carnes, 148 Mass. 223	508	Merrill v. Eastern Railroad, 139 Mass. 238	801
Lothrop v. Fitchburg Railroad, 150 Mass. 423	380, 568	— v. Kaulback, 158 Mass. 328	136
Loughlin v. State, 105 N. Y. 159	470	— v. New England Ins. Co. 103 Mass. 245	825
Louisville, Cincinnati, & Lexington Railroad v. Mahan, 8 Bush, 184	68	Merrimack River Savings Bank v. Lowell, 152 Mass. 556	411
Louisville, New Albany, & Chicago Railway v. Parish, 33 N. E. Rep. 122	118	Merritt v. Marshall, 100 Mass. 244	332
Love v. Sortwell, 124 Mass. 446	246	Miller v. Congdon, 14 Gray, 114	202
Lovejoy v. Boston & Lowell Railroad, 125 Mass. 79	354	— v. Mansfield, 112 Mass. 260	69
— v. Dolan, 10 Cush. 495	835	— v. Miller, 16 Pick. 215	318
— v. Murray, 3 Wall. 1	474	Minor v. Sharon, 112 Mass. 477	506
— v. Webber, 10 Mass. 101	830	Minot v. Joy, 118 Mass. 308	134
Lowe v. Moore, 134 Mass. 259	337		
Lund v. New Bedford, 121 Mass. 286	308		
Lynch v. Boston & Albany Railroad, 159 Mass. 536	129		

Minot v. Taylor, 129 Mass. 160	31	Nugent v. Boston, Concord, & Mon-	
Mitchell v. Bridgewater, 10 Cush.		treal Railroad, 80 Maine, 62	354
411	532	— v. The Supervisors, 19 Wall.	
Model Lodging House Association v.		241	445
Boston, 114 Mass. 133	413	O'Connor v. Daily, 109 Mass. 235	315
Monk v. Beal, 2 Allen. 585	295	Odell v. Boston & Maine Railroad,	
Moody v. Hamilton Manuf. Co. 159		109 Mass. 50	581
Mass. 70	178, 471	Old Colony Railroad v. Wilder, 137	
Morgan v. Curley, 142 Mass. 107	377	Mass. 530	422
Morley v. Culverwell, 7 M. & W. 174	99	Old South Society v. Crocker, 119	
Morris v. French, 106 Mass. 323	208	Mass. 1	271
Morrish v. Murrey, 13 M. & W. 52	23	O'Neil v. Glover, 5 Gray, 144	318
Morse v. Dewey, 3 N. H. 535	136	Opinion of the Justices, 150 Mass.	
— v. Presby, 25 N. H. 299	117	592	410, 439
— v. Blue, 3 Keb. 135	471	Ormsby v. Dearborn, 116 Mass. 386	482
— v. —, 1 Vent. 238	471	Orrok v. Orrok, 1 Mass. 341	112
— v. Woodworth, 155 Mass. 233	560	Quimit v. Henshaw, 35 Vt. 605	68
Mote v. Chicago & Northwestern			
Railroad, 27 Iowa, 22	68	Packard v. Reynolds, 100 Mass. 153	295
Mowry's case, 112 Mass. 304	50	Paddock v. Commercial Ins. Co. 104	
Moynihan v. Hills Co. 146 Mass. 586	26,	Mass. 521	295
	470	Page v. O'Toole, 144 Mass. 303	211
Muncy Traction Engine Co. v. Green,		Palmer v. Marshall, 60 Ill. 289	99
143 Penn. St. 269	15	— v. Merrill, 6 Cush. 286	324
Munigle v. Boston, 3 Allen, 230	315	— v. Stockwell, 9 Gray, 237	450
Munn v. Reed, 4 Allen, 431	185	Parker v. Adams, 12 Met. 415	835
Murchie v. Cornell, 155 Mass. 60	580	— v. Barnard, 185 Mass. 116	22
Murphy v. American Rubber Co.		— v. Iasigi, 188 Mass. 416	77
159 Mass. 266	427	— v. Metropolitan Railroad, 109	
— v. Collins, 121 Mass. 6	114	Mass. 506	265
Murray v. Lovejoy, 2 Cliff. 191	479	— v. Warren, 2 Allen, 187	136
— v. Mayo, 157 Mass. 248	102	Parrott v. Avery, 159 Mass. 594	383
	*	Parsons v. Charter Oak Ins. Co. 31	
National Bank of the Common-		Fed. Rep. 305	236
wealth v. Law, 127 Mass. 72	89	Paul v. Paul, 136 Mass. 286	278
National Trust Co. v. Miller, 6 Stew.		Paynter v. James, L. R. 2 C. P. 348	279
155	236	Peirce v. Boston & Lowell Railroad,	
Nauer v. Thomas, 18 Allen, 572	50	141 Mass. 481	389
Neff v. Pennoyer, 3 Sawyer, 274	118	Pennsylvania Railroad v. Miller, 132	
— v. Wellesley, 148 Mass. 487	411	U. S. 75	445
Newcomb v. Williams, 9 Met. 525	202	People v. Seelye, 146 Ill. 189	422
Newell v. Newton, 10 Pick. 470	476	— v. Smith, 21 N. Y. 595	309
New Haven & Northampton Co. v.		Percival v. Hickey, 18 Johns. 257	471
Hayden, 117 Mass. 433	34, 376	Perry v. Breed, 117 Mass. 155	560
New York & New England Rail-		— v. Cross, 132 Mass. 454	494
road's appeal, 58 Conn. 532	265	Phipps v. Jones, 20 Penn. St. 260	14
—, 62 Conn. 527	265	Plank's Tavern Co. v. Burkhard, 87	
New York & New England Rail-		Mich. 182	14
road v. Bristol, 14 Sup. Ct. Rep.		Platt v. Brown, 16 Pick. 553	23
437	265	Plumley's case, 156 Mass. 236	50
Nichols, appellant, 157 Mass. 20	420	Plumley v. Birge, 124 Mass. 57	185
Nichols v. Johnson, 10 Conn. 192	162	Poland v. Brownell, 131 Mass. 138	522
Nims v. Mount Hermon Boys'		Pond v. Harris, 113 Mass. 114	376
School, 160 Mass. 177	439	Pope v. Allis, 115 U. S. 363	580
— v. Spurr, 133 Mass. 209	136	— v. Burrage, 115 Mass. 282	413
Norris v. Saxton, 158 Mass. 46	335	Portland & Rochester Railroad v.	
Northampton. In re Mayor, &c. of,		Deering, 78 Maine, 61	206
158 Mass. 209	265	Potter v. Smith, 103 Mass. 68	125
Northcut v. Lemery, 8 Oregon, 316	118	Pratt v. Elgin Baptist Society, 93 Ill.	
Norton v. Piscataqua Ins. Co. 111		475	14
Mass. 532	325	— v. Prouty, 153 Mass. 333	160, 297
Norway Plains Co. v. Boston &		Priest v. Groton, 103 Mass. 530	596
Maine Railroad, 1 Gray, 263	69	Prince v. Boston & Lowell Railroad,	
Norwich & Worcester Railroad v.		101 Mass. 542	581
County Commissioners, 151 Mass.		Pynchon v. Stearns, 11 Met. 304	315
69	390		

Queen, The, 40 Fed. Rep. 694	470	Savile v. Roberts, 1 Ld. Raym. 374	876
— v. Bernardo, [1891] 1 Q. B. 194	51	Sawyer v. Davis, 186 Mass. 239	212
Quinn v. New Jersey Lighterage Co. 23 Fed. Rep. 363	470	Scanlon v. Boston & Albany Railroad, 147 Mass. 484	354
Radclyffe v. Barton, 154 Mass. 157	329	Schlessinger v. Dickinson, 5 Allen, 47	500
Railroad Co. v. Harris, 12 Wall. 65	425	Scott v. Colburn, 26 Beav. 276	552
Randall v. Baltimore & Ohio Railroad, 109 U. S. 478	354	Sears v. Chapman, 158 Mass. 400	273
Raphael v. Reinstein, 154 Mass. 178	479	Seavey v. Potter, 121 Mass. 297	482
Redigan v. Boston & Maine Railroad, 155 Mass. 44	150	Sedalia, Warsaw, & Southern Railway v. Wilkerson, 88 Mo. 235	14
Reyer v. Odd Fellows' Fraternal Accident Association, 157 Mass. 367	425	Semayne's case, 1 Smith's Lead. Cas. (9th Am. ed.) 228	23
Rice v. Hart, 118 Mass. 201	69	Sennott's case, 146 Mass. 489	50
Richardson v. Tobey, 121 Mass. 457	486	Sewall v. Robbins, 139 Mass. 164	329
Richelieu Hotel Co. v. International Military Encampment Co. 140 Ill. 248	14	Shannon v. Shannon, 2 Gray, 285	112
Richmond City Railway v. Scott, 86 Va. 902	396	Shattuck v. Bill, 142 Mass. 56	574
Richstain v. Washington Mills, 157 Mass. 538	298	— v. Stedman, 2 Pick. 468	399
Ricker v. American Loan & Trust Co. 140 Mass. 346	306	Shaw v. Shaw, 93 Mass. 158	511
Riley's case, 2 Pick. 172	49	Sheldon v. Carpenter, 4 Comst. 578	876
Roberts v. Rockbottom Co. 7 Met. 46	89	— v. Hopkins, 7 Wend. 435	118
Rochester Proprietors v. Hammond, Quincy, 159	318	Shepard v. Boston & Maine Railroad, 158 Mass. 174	129
Rockwood v. Wolcott, 3 Allen, 458	456	Sherman v. Wilder, 106 Mass. 537	208
Rogers v. Rogers, 139 Mass. 440	456	Shinners v. Proprietors of Locks & Canals, 154 Mass. 168	53
Rollins v. Marsh, 128 Mass. 116	529	Shober v. Lancaster County Park Association, 68 Penn. St. 429	14
Rood v. Lawrence Manuf. Co. 155 Mass. 590	161	Shuey v. United States, 92 U. S. 73	15
Rooney v. Sewall & Day Cordage Co. 161 Mass. 153	298	Simmons v. Saul, 188 U. S. 439	113
Rose v. Ingram, 98 Ind. 276	136	Simpson v. Commonwealth, 111 Mass. 417	188
Ross's case, 2 Pick. 165	49	Sinking Fund cases, 99 U. S. 700	266
Roth v. Buffalo & State Line Railroad, 84 N. Y. 548	68	Sisson v. New Bedford, 137 Mass. 255	532
Roxbury v. Boston & Providence Railroad, 6 Cush. 424	265	Slack v. Black, 109 Mass. 496	245
Russell v. Lewis, 2 Pick. 508	164	Smith v. Baker, [1891] A. C. 325	259
— v. Tillotson, 140 Mass. 201	160	— v. Edwards, 156 Mass. 221	581
Sabariego v. Maverick, 124 U. S. 261	117	— v. Hale, 158 Mass. 178	580
Sage v. Central Railroad, 99 U. S. 834	413	— v. Livingston, 111 Mass. 842	91
— v. Heller, 124 Mass. 218	386	— v. Morrison, 22 Pick. 430	143
St. Louis & Cairo Railroad v. Hardway, 17 Bradw. (Ill.) 321	70	— v. Smith, 50 N. H. 212	481
St. Peter v. Denison, 58 N. Y. 416	310	— v. —, 51 N. H. 571	481
Salem v. Eastern Railroad, 98 Mass. 431	75	Smith Charities v. Connolly, 157 Mass. 272	838
Salem India Rubber Co. v. Adams, 23 Pick. 256	522	Somerby v. Buntin, 118 Mass. 279	326
Saltonstall v. Sanders, 11 Allen, 446	403	Soper v. Arnold, 35 Ch. D. 384	414
Samson v. Thornton, 8 Met. 275	383	Sparrow v. Evansville & Crawfordsville Railroad, 7 Ind. 369	445
Sanborn v. Carleton, 15 Gray, 899	49	Spear v. Cummings, 23 Pick. 224	393
— v. —, 22 Law Rep. 730	49	Spencer v. Williams, 160 Mass. 17	88, 95
— v. —, 23 Law Rep. 8	49	Spicer v. South Boston Iron Co. 188 Mass. 426	26, 189
Sanders v. Coward, 13 M. & W. 65	421	Standish v. Lawrence, 111 Mass. 111	486
Sands v. Mc Clelan, 6 Cowen, 582	279	Stanton v. Eager, 16 Pick. 467	581
Sargent v. Franklin Ins. Co. 8 Pick. 90	218	— v. Salem, 145 Mass. 476	7
		State v. Gravelin, 16 R. I. 407	63
		— v. Guinness, 16 R. I. 401	63
		— v. Henderson, 54 Md. 332	422
		— v. Intoxicating Liquors, 76 Iowa, 243	63
		— v. Wabash, St. Louis, & Pacific Railway, 83 Mo. 144	265
		Stearns v. Hall, 9 Cush. 31	456
		Stedman v. Priest, 103 Mass. 298	31
		Steel v. Steel, 4 Allen, 417	489

Stephens, <i>Ex parte</i> , 11 Ves. 24	217	Ufford v. Spaulding, 156 Mass. 65	114
Stevens v. Commonwealth, 4 Met. 360	122	Union Ins. Co. v. McMillen, 24 Ohio St. 67	426
— v. Lincoln, 114 Mass. 476	468	Upham v. Emerson, 119 Mass. 509	547
— v. Stevens, 1 Met. 279	120		
Stock v. Boston, 149 Mass. 410	411	Vance's estate, 141 Penn. St. 201	547
Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290	163	Vanuxem v. Burr, 151 Mass. 388	475
Stockton & Darlington Railway v. Brown, 9 H. L. Cas. 246	309	Varian v. New England Mutual Accident Association, 156 Mass. 1	288
Stoddard v. Winchester, 154 Mass. 149	7	Vinal v. Richardson, 18 Allen, 521	501
— v. —, 157 Mass. 567	7	Vineburg v. Grand Trunk Railroad, 18 Ont. App. 93	68
Stone v. Carter, 13 Gray, 575	49	Wait v. Thayer, 118 Mass. 473	89
— v. Chamberlain, 7 Gray, 206	331	Walker v. Locke, 5 Cush. 90	245
Storms v. Smith, 137 Mass. 201	513	— v. Old Colony & Newport Railway, 103 Mass. 10	212
Stovall v. Banks, 10 Wall. 583	422	— v. Pittman, 108 Ind. 341	376
Strasburg Railroad v. Echternacht, 21 Penn. St. 220	15	Wallace v. Townsend, 43 Ohio St. 537	14
Striker v. Kelly, 7 Hill, (N. Y.) 9	118	Walling v. Miller, 108 N. Y. 173	388
Stulta v. Newhall, 118 Mass. 98	456	Wardwell v. Hale, 161 Mass. 396	462
Sullivan v. India Manuf. Co. 113 Mass. 396	53	Waring v. Clarke, 5 How. 441	471
		Warren v. Fitchburg Railroad, 8 Allen, 227	301
Taft v. Commonwealth, 158 Mass. 526	211	— v. James, 130 Mass. 540	337
Tainter v. Worcester, 123 Mass. 311	369	Washburn v. Great Western Ins. Co. 114 Mass. 175	482
Talbot v. Hudson, 16 Gray, 417	308	Waters v. Travis, 9 Johns. 450	163
Tarbell v. Jewett, 129 Mass. 457	528	Watertown Ins. Co. v. Simmons, 181 Mass. 85	422
Taylor v. Columbian Ins. Co. 14 Allen, 363	232, 365	Watson v. Wyman, 161 Mass. 96	104
— v. Page, 6 Allen, 86	99	Wells v. Dench, 1 Mass. 232	136
Thatcher v. Gammon, 12 Mass. 267	331	West v. West, 2 Mass. 223	112
Thayer v. Thayer, 101 Mass. 111	208	Westcott v. New York & New England Railroad, 152 Mass. 465	431
Thomas v. Brown, 1 Q. B. D. 714	414	Westfield v. Mayo, 122 Mass. 100	376
— v. Robinson, 8 Wend. 267	118	Wheeler v. Guild, 20 Pick. 545	99, 104
Thompson's case, 122 Mass. 428	50	Wheelock v. Henshaw, 19 Pick. 341	318
Thompson v. Hale, 6 Pick. 258	89	White v. Boston & Albany Railroad, 144 Mass. 404	503
— v. Whitman, 18 Wall. 457	113	— v. Clapp, 8 Allen, 283	332
Thruston v. Blackiston, 36 Md. 501	421	— v. Dolliver, 113 Mass. 400	476
Tindley v. Salem, 137 Mass. 171	293	— v. Franklin Bank, 22 Pick. 181	3
Tingley v. Cutler, 7 Conn. 291	414	— v. Lang, 128 Mass. 598	183
Tinkham v. Sawyer, 153 Mass. 485	160, 297	— v. Philbrick, 5 Greenl. 147	479
		— v. Phillipston, 10 Met. 108	393
Todd v. Old Colony & Fall River Railroad, 3 Allen, 18	353	— v. Weatherbee, 126 Mass. 450	422
— v. Rowley, 8 Allen, 51	208	Whitehall Bank v. Pettes, 13 Vt. 395	136
Tompson v. Mussey, 3 Greenl. 305	377	Whiting v. Stacy, 15 Gray, 270	500
Train v. Boston Disinfecting Co. 144 Mass. 523	75	Whittier v. Dana, 10 Allen, 326	456
Trask v. Hartford & New Haven Railroad, 2 Allen, 331	476	Wightman v. Wightman, 4 Johns. Ch. 343	115
Tucker v. Mutual Benefit Co. 50 Hun, 50	151	Wilcox Silver Plate Co. v. Green, 72 N. Y. 17	112
Turner v. Brock, 6 Heisk. 50	474	Wiley v. Athol, 150 Mass. 426	580
— v. Fitchburg Railroad, 145 Mass. 433	285	Wilkins v. Jewett, 139 Mass. 29	486
— v. Wentworth, 119 Mass. 459	339	Williams v. Adams, 3 Allen, 171	392
Tuttle v. Detroit, Grand Haven, & Milwaukee Railway, 122 U. S. 189	854	— v. Bradley, 8 Allen, 270	31
— v. Travellers' Ins. Co. 134 Mass. 175	152	Wilson v. Mackenzie, 7 Hill, (N. Y.) 95	471
Tyler v. Currier, 13 Gray, 134	581	— v. Sleeper, 181 Mass. 177	466
Tyndale v. Old Colony Railroad, 156 Mass. 503	843	Wing v. Hayford, 124 Mass. 249	413
		Winslow v. Draper, 8 Pick. 170	95
		— v. Goodwin, 7 Met. 363	508
		Wood v. Le Baron, 8 Cush. 471	375

Woodbury v. Marblehead Water Co. 145 Mass. 509	280	Wright v. Andrews, 130 Mass. 149	424
Worcester v. Western Railroad, 4 Met. 564	389	—— v. Nostrand, 94 N. Y. 81	136
Worster v. Great Falls Manuf. Co. 41 N. H. 16	593	Wyeth v. Richardson, 10 Gray, 240	48
Worthen v. Cleaveland, 129 Mass. 570	340	Wylson v. Dunn, 84 Ch. D. 569	247
Worthy v. Warner, 119 Mass. 550	137	Yale v. Comstock, 112 Mass. 267	329
Wright's case, L. R. 7 Ch. 55	458	Yeaton v. Roberts, 28 N. H. 469	547
		Zeigler v. Day, 128 Mass. 152	54

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

JAMES W. BROWN *vs.* GEORGE F. NEALLEY.

Suffolk. January 10, 1894. — March 1, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

*Composition with Creditors — Secret Agreement with one Creditor — Parties not
in Pari Delicto.*

A corporation, of which A. was president, assented, as a creditor of B., to an assignment of his property made by him for the benefit of his creditors; it being understood at the time of the assignment that B. should compromise with his creditors by paying them sixty per cent instead of the assignment being carried out. A. obtained from B. an agreement to pay A. a sum equal to forty per cent of B.'s indebtedness to the corporation, as compensation for money to be lent by A. to enable B. to carry out the contemplated compromise; and, as security for the money so to be lent and such compensation, B. executed to A. an assignment of his equity in the personal property which had been assigned in trust for the benefit of his creditors. In fact, B. received no money from A., but the compromise was carried out and the sixty per cent paid to the creditors, and B. received back from the assignees all the property remaining in their hands. A. then brought an action against B. for the conversion of the property, seeking to recover a sum equal to forty per cent of B.'s original indebtedness to the corporation. *Held*, that the action could not be maintained; and that the parties were not *in pari delicto*.

TORT, for the conversion of certain personal property. Trial in the Superior Court, without a jury, before *Braley, J.*, who ruled that the action could not be maintained; found and

ordered judgment for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was right, judgment was to be entered for the defendant; otherwise, for the plaintiff. The facts appear in the opinion.

C. H. Sprague & C. E. Washburn, for the plaintiff.

C. W. Bartlett, for the defendant.

ALLEN, J. The defendant, being embarrassed in his business, made an assignment of his property in trust for the benefit of his creditors. The plaintiff was president of a corporation which was a creditor, and which assented to the terms of the assignment. It was understood at the time of the assignment that the defendant should compromise with his creditors by paying them sixty per cent, instead of the assignment being carried out. The plaintiff obtained from the defendant an agreement to pay him a sum equal to forty per cent of the defendant's indebtedness to the plaintiff's corporation, as compensation for money to be lent by the plaintiff to enable the defendant to carry out the contemplated compromise; and as security for the money so to be lent and said compensation, the defendant executed to the plaintiff an assignment of his equity in the personal property which had been assigned in trust for the benefit of his creditors. In point of fact, the defendant received no money from the plaintiff, but the compromise was carried out and the sixty per cent paid to the creditors, and the defendant received back from the assignees all the property remaining in their hands.

The action is tort for the conversion by the defendant of the property, and the plaintiff seeks to recover the sum equal to forty per cent of the defendant's original indebtedness to the plaintiff's corporation.

The court found that the agreement with the plaintiff was for the purpose of enabling his corporation to receive pay in full for its claim against the defendant, while the other creditors should get but sixty per cent, and that, while it was made in the name of the plaintiff, it was intended for the benefit of the company, and the company was the real party in interest, and that the signing by the company of the agreement of composition was induced by said agreement: and thereupon ordered judgment to be entered for the defendant.

These findings were well warranted by the evidence, and the entry of judgment for the defendant was right. It is true that at the time of the defendant's promise and assignment to the plaintiff the plaintiff's corporation had already signed its assent as a creditor to the defendant's assignment for the benefit of his creditors, but the agreement of composition at sixty per cent had not then been signed or prepared, and the plaintiff's intimation to the defendant was that his company must not lose anything by the settlement, and that he should charge to the defendant a sum equal to forty per cent. The fact that the defendant's promise was not made directly to the corporation is immaterial. The plaintiff stood in its place. The object was to secure the assent of the corporation by a secret agreement by which it should get more than the rest of the creditors. Such promise is void. *Huckins v. Hunt*, 138 Mass. 366.

The plaintiff contends that the parties were *in pari delicto*. If so, the law leaves the parties where they stand, and will not help the plaintiff. *Dent v. Ferguson*, 182 U. S. 50. *Huckins v. Hunt*, 138 Mass. 366. But though the defendant was *in delicto*, it is not found and cannot now be said that he was *in pari delicto*, because he was acting under stress of circumstances. *White v. Franklin Bank*, 22 Pick. 181. *Duval v. Wellman*, 124 N. Y. 156. *Pomeroy*, Eq. Jur. §§ 403, 942.

Judgment for the defendant.

HENRY BINGHAM vs. CITY OF BOSTON.

Suffolk. January 16, 1894. — March 1, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Defective Highway — Inference of Want of Diligence by City.

In an action against a city for injuries occasioned to the plaintiff's horse and wagon, very early in the morning, by sinking into a hole in a street, where a trench had been dug for the purpose of laying a drain under a permit from the city, although there is evidence on the part of the city tending to show that the trench was properly filled and left in that condition on the afternoon preceding the acci-

dent, the jury will be warranted in finding that, by the use of reasonable care and diligence, the proper officers of the city might have known of the defect in time to remedy it.

TORT, for injuries occasioned to the plaintiff's horse and wagon by an alleged defect in School Street in the West Roxbury district of Boston. Trial in the Superior Court, before *Bishop, J.*, who allowed a bill of exceptions, in substance as follows.

It appeared in behalf of the plaintiff that one Donnelly was driving the plaintiff's horse and wagon upon School Street, up grade, on the morning of June 29, 1889, between four and five o'clock, about daylight, when, without warning, his horse's fore feet sank below the surface of the street; that Donnelly saw, up to the instant of sinking, nothing in the place where the horse's feet sank that was out of the way, or different from the surface of the rest of School Street, which was in good repair, and over which he had just passed in safety; that he was keeping a proper lookout, and giving proper attention to driving the horse, before he reached the spot where the horse sank; and that in getting the horse out of the place the horse and wagon received the injuries complained of.

It also appeared that at the time of the accident there was a place in the street extending from the sidewalk across the roadway to the car track near the middle of the street, some four to five feet broad, where there was soft mud, into which the horse sank over his gambrels; that the horse pulled himself and the front wheels of the wagon out, but the hind wheels sank in up to the hubs; that the mud was too soft to bear a man, and planks were put down to stand upon in getting out of the wagon; and that another horse was put on and the wheels "jacked" up with a timber so as to get the wagon out.

One Kelly, called as a witness by the plaintiff, testified that, as an inspector of house sewer connections for the sewer department of the defendant city, he inspected a house drain connection on School Street on June 25, 1889, that there was then a trench in the street; that he inspected the pipes connected with the main sewer, and connections were properly made and were tight; and that the person who owned the house where the drain was lowered and relaid was named Messer. On cross-examination, he testified that Samuel Gist, under whose superintendence the

drain was constructed, was a competent and skilful drain layer, and did very good work.

One Carter, called as a witness by the plaintiff, testified that he was, at the time of the trial, superintendent of streets of the defendant city; that he had with him a book of "stubs," on which applications were made for permits for excavations in streets; that the missing leaves annexed to the "stubs" were torn out and given to the persons asking the permits; that the permits issued were probably destroyed after they were returned to the department; that the permits were collected by the police officers where the excavation was made; that the permit of which the application stub remained in the book could not be found; and that he could not give the form of permit in use at the time of the accident. The following application stub was then admitted in evidence:

"817 Application. Boston, June 21, 1889. I hereby apply for permission to open School Street, Roxbury, near Byron Court, for the estate of Messer, to repair a drain, . . . and I agree to make connection with the sewer only in the presence of the inspector. Should the work consist of repairs only, I will not cover up the same until the inspector has seen the work; and I will fulfil all the conditions required in rules for drain layers. Samuel Gist."

It was admitted that School Street is a public street of the defendant city; and that due notice of the time, place, and cause of the injury was given to the defendant.

Michael Callahan, a police officer of Boston, testified that his route was over School Street; that he saw the trench, and took up the permit to open the street; that he saw the trench being filled at two o'clock in the afternoon of the day before the accident, and again at about five o'clock; that it then appeared all right; and that it was "crowned" and properly filled.

For the defendant it appeared that Gist had been a drain layer for fifteen years prior to 1886; that he had done a very large amount of work in that period; that on June 24, 1889, he opened School Street, near Byron Court, to lay a sewer drain; that the drain was properly laid, and sewer connections were properly and tightly made; that the portion laid in the street was covered in on June 28, 1889; that the proper way to fill a

trench in the street was to puddle it up to two feet of the street level, and then, ceasing to puddle, to fill with earth and ram it hard to the top a little above the street level; that puddling meant throwing in of earth and pouring thereon a proper amount of water, as the earth went into the trench; that he held a hose-pipe part of the time, part of the time no one held it, and part of the time some workmen held it; that Gist personally supervised the filling of the trench on June 28, himself holding the hose and pouring in a proper amount of water as the earth was put in; that when the filling reached within two feet of the street level, he ceased puddling, as was proper, and then the gravel which was thrown in was rammed down solid to the top, a little, three or four inches or so, above the street level; that the earth so pounded solid was left a little crowning, in the highest part three or four inches above the street level; that the work was done right and was a workmanlike job; that it was completed about three or four o'clock in the afternoon of June 28, 1889; "that the street at the point was then solid and firm for travel when the work was done"; that teams went over the place that afternoon after it was completed, as they did over the rest of the street, without sinking or cutting, and safely; and that the place appeared to be all right.

On cross-examination, Gist testified that he had a permit from the city to open the street; that a police officer took it up; and that, before beginning the excavation, he had given a bond of \$1,000 to the city to indemnify it from any claim of damage.

At the close of the evidence, the defendant requested the judge to rule that, on the evidence, the plaintiff could not recover. The judge declined so to rule; and the defendant excepted.

The judge gave full instructions to the jury upon the questions in the case, without exception by the defendant, and among other things instructed the jury as follows: "If you find that the street was actually defective when the accident took place, then you are also to consider whether the city and its officers did notice it, or whether the nature of the defect was such that with due diligence and care they might have noticed it." To the above instruction the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. W. Proctor, for the defendant.

J. Prentiss, for the plaintiff.

ALLEN, J. The difficulty in this case arises from the form of the bill of exceptions, in which it is stated that "for the defendant it appeared," amongst other things, that all the details of the work of filling up the trench were properly done; that "the work was done right, and was a workmanlike job"; and that "the street at the point was then solid and firm for travel when the work was done," which was about three or four o'clock in the afternoon of the day before the accident. If all this appeared as facts proved and not open to controversy, it is difficult to see any want of reasonable care and diligence on the part of the defendant in omitting to guard against the defect which certainly existed early the next morning. The only way to account for such defect the next morning would be some cause intervening after the completion of the work. But we are inclined to think that the bill of exceptions is inaccurate in stating that these facts appeared, and that all that was meant is that there was testimony on the part of the defendant tending to prove them. So construing the exceptions, the jury might find that the condition of the street the next morning was sufficient to show that in point of fact the work of filling the trench was badly done; and, if badly done, that observation of the work while it was going on, or of the place afterwards, would show it to a skilled eye. Although the time which elapsed before the accident was short, we cannot say that by the use of reasonable care and diligence the proper officers of the city would not have known of the defect in time to remedy it. *Stoddard v. Winchester*, 157 Mass. 567; *S. C.* 154 Mass. 149. *Stanton v. Salem*, 145 Mass. 476. *Hanscom v. Boston*, 141 Mass. 242.

We are confirmed in the above construction of the bill of exceptions by the statement in the defendant's brief that all the evidence "tended to show" the above facts.

Exceptions overruled.

HENRY H. COTTON, executor, vs. CITY OF BOSTON.

Suffolk. November 24, 1893. — March 2, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

*Tax — Goods kept and sold by Executor in Testator's Shop in closing Business
— Testator's last Residence elsewhere.*

If an executor keeps his testator's former shop open and sells the goods therein, occasionally replenishing the stock with small purchases, although for the sole purpose of settling the estate and closing the business, the stock of goods is taxable to the executor, under Pub. Sts. c. 11, § 20, cl. 1, in the city where the shop is hired and the business carried on, although the testator last dwelt in another city.

CONTRACT, by the executor of the will of William H. Ward, to recover back the amount of a tax assessed to him as such executor upon the stock in trade of Ward's estate, on May 1, 1891, by the assessors of the defendant city, and paid under protest by the plaintiff. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, upon agreed facts, in substance as follows.

The testator, William H. Ward, last dwelt in Cambridge, and died there on December 14, 1890. The plaintiff, on January 6, 1891, was appointed executor of Ward's will, and qualified as such executor, and has ever since so continued.

The testator at the time of his death was lessee of a store in Boston, and there carried on business on his sole account, and was sole owner of the personal property employed therein, consisting of goods, wares, merchandise, and other stock in trade. On May 1, 1891, the plaintiff as such executor, who resided in Lexington, occupied the store and had therein in his possession such personal property for the sole purpose of settling the estate, and for that purpose was then engaged in selling therefrom, in the usual course of trade, said goods, wares, and merchandise. The stock was replenished with small purchases of new goods occasionally made by him as such executor, in order that, in settling the estate, the closing up of the business might be advantageously done.

If, upon the above facts, the personal property of the deceased was legally liable to taxation in Boston on May 1, 1891, judgment was to be entered for the defendant; otherwise, for the plaintiff.

R. W. Nason, for the defendant.

C. F. Kittredge, for the plaintiff.

HOLMES, J. The agreed statement of facts raises the question where an executor is to be taxed for his testator's stock in trade in his testator's shop, if the executor keeps the shop open and sells the goods, occasionally replenishing the stock with small purchases, but all for the sole purpose of settling the estate and closing the business. We think it plain that if, under the terms of a will, an executor should carry on his testator's business as a continuing thing, and not for the purpose of winding it up, the stock in trade would be taxable, under Pub. Sts. c. 11, § 20, cl. 1, in the city or town where the shop was hired and the business carried on, in this case in Boston, notwithstanding the general provision of clause 7, that the personal estate of deceased persons shall be assessed in the place where the deceased last dwelt. We are of opinion that the fact that the business is carried on for the purpose of settling the estate makes no difference in the principle. The chattels still constitute a stock in trade; there still is a going business, and the same benefit still is derived from the conveniences and protection offered by the city in question, whatever the purposes of the executor, and whether the time for which he intends to carry on the trade be longer or shorter. It would be different, no doubt, if what had been a stock in trade simply were kept locked up in the shop until it could be sent to auction or disposed of in the lump.

Judgment for the defendant.

HUDSON REAL ESTATE COMPANY vs. HERMAN C. TOWER
& another.

Middlesex. January 9, 10, 1894. — March 2, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Subscription to Stock — Withdrawal of Subscription — Sufficiency of Notification of Withdrawal — Evidence.

If A., who, as one of several associates, has subscribed for shares of stock in a corporation to be thereafter organized, gives oral notice of the withdrawal of his subscription, during an interview between them, to B., who is acting as the representative of the associates, and who, at a meeting two days previously for the organization of the corporation, has been chosen president, the choice of officers being by the laws of the State in which the corporation is organized a necessary preliminary to the creation of the corporation, such notification of withdrawal is sufficient, although the association does not come into legal existence as a fully formed corporation until a later date.

A subscription for shares of stock in a corporation to be thereafter organized may be withdrawn before the organization of the corporation, although the associates have taken action on the strength of such subscription.

In an action by a corporation to recover the amount of a subscription for shares of stock therein, claimed by the defendant to have been withdrawn before the corporation was organized, the conversation between the solicitor of the subscription and the defendant when he made his subscription, the statements made by the solicitor at a meeting of the associates in regard to the nature of the defendant's subscription, a conversation between the defendant and the representative of the associates tending to show a revocation of the subscription if it was voted by them to do a certain act, and the subsequent passing of such a vote, are admissible in evidence for the purpose of showing the withdrawal of the defendant's subscription before the organization of the corporation; and, being limited to that purpose by the judge in his instructions to the jury, the plaintiff has no ground of exception.

CONTRACT, to recover the amount of a subscription by the defendants, as copartners, for ten shares of stock in the plaintiff corporation. After the former decision, reported 156 Mass. 82, the case was tried in the Superior Court, before *Bond, J.*

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

J. T. Joslin, (R. E. Joslin with him,) for the plaintiff.

J. E. Cotter & H. S. Ormsby, for the defendants.

ALLEN, J. It was heretofore decided in this case, that until the organization of the corporation the defendants' subscription was a mere proposition or offer which might be withdrawn, like any other unaccepted offer. 156 Mass. 82. The principal question which the plaintiff now seeks to present is, whether, upon the evidence and under the ruling of the court, the jury were warranted in finding a legal withdrawal or revocation of the subscription.

The only withdrawal or revocation relied on occurred in an interview between one of the defendants and Henry Tower, on August 31st, 1889, and in view of the verdict the only question left is whether a notification of withdrawal given orally to Henry Tower was sufficient.

It will be necessary to state the situation of the parties. The contract declared on is given below.*

The corporation was organized under the laws of Maine. The meeting for the organization was held at Portland, Maine, August 29th, 1889, at which time the articles of agreement, having been signed, were presented, by-laws were adopted, and officers were chosen. The necessary papers were then prepared as required by law, and were approved by the Attorney General of Maine on September 5th, were recorded on September 6th,

* "We, the undersigned, hereby subscribe for and agree to purchase the number of shares set against our respective names of the capital stock in a corporation to be organized under the laws of such State as a committee hereafter to be appointed from the subscribers shall determine, said shares of capital stock to be of the par value of fifty dollars, and the capital stock of said corporation to be not less than twenty-five thousand dollars, said corporation to be organized for the purpose of purchasing land, and erecting a shoe-shop thereon with the necessary appliances connected therewith, in the town of Hudson, to be rented when completed to H. H. Mawhinney & Co. for a term of ten years at a rental of seven per cent per annum on the cost of the plant when completed. Said corporation to be organized as soon as may be, and in advance thereof an agreement in writing between a committee of the subscribers, in behalf of all, with said H. H. Mawhinney & Co. to be executed binding the latter to take said plant for the period and at the terms stated, and on the organization of said corporation to be re-executed to bind both parties. And the subscribers hereto hereby bind themselves severally to pay for said stock to the treasurer of said corporation in the way and manner that the corporation when organized shall determine. And we severally agree that one seal shall be the seal of each.

"Hudson, August 7, 1889."

and were received and filed in the office of the Secretary of the State on September 7th, 1889. It was agreed at the argument that, under the laws of Maine, the legal existence of the corporation as a corporation began on September 7th.

On the 31st of August, Henry Tower's position was as follows. It must be assumed, though the bill of exceptions does not in express terms so state, that he was one of the subscribers. One of the plaintiff's requests for instructions assumes that there was a contract of the firm above referred to "with Henry Tower and others in behalf of the associates for the purchase of land and building a shoe-shop thereon, dated August 19, 1889." This contract, being thus referred to by the plaintiff as an undisputed fact, must be taken to show that Henry Tower was acting as the person first named on the committee contemplated by the subscription paper, to obtain an agreement in writing binding said firm to take a lease of the premises. On August 29th, at a meeting which apparently was the first formal step in the organization of the corporation, he was chosen president. By the statutes of Maine, which it was agreed we should refer to, the choice of officers is a necessary preliminary to the creation of the corporation. Rev. Sta. of Maine of 1883, c. 48, §§ 17-19.

It is also obvious that on August 31st he was, in the opinion of the jury, acting as an officer in behalf of the associates, and not merely on account of his personal interest as one of the subscribers. Such is the fair result of the instructions taken as a whole. The judge in the course of his charge called the jury's attention to this distinction by saying: "If Henry Tower was one of the officers of the associates for the purpose of managing their business, it would not be necessary that any other notice should be given than what was given to him; but if he went there simply as being interested, not acting as an officer, . . . it may be that he was not an officer so that he would be a party authorized to receive any notice of withdrawal, and if he was not, then it would be necessary for that fact to be communicated to the meeting." It being pointed out to the judge at the close of the charge, that the plaintiff's records showed that at the meeting on August 29th Henry Tower was chosen president, he further instructed the jury, that if he had been so chosen president, and if the defendants notified him distinctly that, if a certain event

should happen with reference to the change of the policy of the corporation as to mortgaging its property, they would no longer be in the association and would not pay a cent on their subscription, that would be a sufficient notification of their withdrawal if the event did happen. The undisputed testimony, so far as it is recited or disclosed in the bill of exceptions, goes to show that Henry Tower in that interview was acting in a representative capacity, and not merely on his own personal account. The plaintiff's requests for instructions raised no question on this point, but asked the court to rule that, "in order to constitute a valid withdrawal, the defendants must do some act or make some unequivocal or unconditional statement to the proper officer or officers of the associates which shall amount to a public withdrawal from said contract." The instructions were given with reference to this request, and, as we understand them, they amounted to this, that Mr. Tower having been chosen as president, and acting for the associates, was on August 31st a proper officer to be notified by the defendants of their withdrawal.

We think this instruction was right. No instruction was asked at the trial that, in order to withdraw from the associates, notice must be given to all of them individually, or at a meeting of the associates. The plaintiff only contended that the notice must be given to the proper officer or officers; and it would plainly be impracticable to require a direct personal notice to them all. The right to withdraw would be nugatory if this were necessary. A subscriber who has a right to withdraw may not know, or have the means of knowing, who all of his associates are, or where they live. If he does know, they may be many in number, and widely scattered; or some of them may be away on a journey. No general meeting of them may be called which he can attend without leaving the State. He need not wait for a meeting before giving his notice of withdrawal. It was indeed held in an early case in England, that all of the other subscribers must not only have notice, but must actually consent, before one of the subscribers could withdraw. *Kidwelly Canal Co. v. Raby*, 2 Price, 93. But now, in England as well as here, no such consent is necessary. If every one of the other subscribers should object, yet it is the right of a subscriber to withdraw before the corporation is formed. It is

merely a question of giving due notice of his withdrawal. And in England it is not intimated in any modern case, so far as our examination has gone, that notice must be given to all the other subscribers, or at a meeting of subscribers. The retraction has usually been made to the same persons to whom the application for shares was made. See Lindl. Part. (4th ed.) 99-105 and numerous cases cited.

In this country no case has been cited, and we have found none, discussing the question what notice of withdrawal will be sufficient. In some cases, no attempt to withdraw was made till after the corporation was formed. See, for examples, *International Fair & Exposition Association v. Walker*, 83 Mich. 386; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248; *Ashuelot Boot & Shoe Co. v. Hoyt*, 56 N. H. 548; *Shober v. Lancaster County Park Association*, 68 Penn. St. 429. It is said in *Cartwright v. Dickinson*, 88 Tenn. 476, "Before the organization of the corporation and acceptance of the subscription . . . the promoters might, perhaps, agree to release a subscriber by substituting other names for his." This goes on the idea that the subscriber has not an absolute right to withdraw, and that somebody's assent is necessary. In *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, the subscriber apparently made known his refusal to the persons who brought a second paper to be signed by him, and it was held to be sufficient, but the proper mode of giving such notice is not discussed, and the court incidentally remarked that "the incorporators well knew when the company was organized . . . that the defendants expressly repudiated the whole arrangement." It is held that the death of a subscriber before the formation of the corporation is a revocation of a subscription. *Phipps v. Jones*, 20 Penn. St. 260. *Wallace v. Townsend*, 43 Ohio St. 587. *Pratt v. Elgin Baptist Society*, 93 Ill. 475. *Sedalia, Warsaw, & Southern Railway v. Wilkerson*, 83 Mo. 235. Insanity is also held to be a revocation in *Beach v. First Methodist Episcopal Church*, 96 Ill. 177. Death is a public fact, of which all the world must take notice, though the above decisions were not put on that ground; *Marlett v. Jackman*, 3 Allen, 287; but insanity is not. In most of the cases where the right of withdrawal of a subscription has been held to exist, there is nothing to show that all the other sub-

scribers were notified, and there has been no question as to the sufficiency of the mode in which the withdrawal was made. See, in addition to the cases above cited, *Auburn Bolt & Nut Works v. Shultz*, 143 Penn. St. 256; *Muncy Traction Engine Co. v. Green*, 143 Penn. St. 269; *Garrett v. Dillsburg & Mechanicsburg Railroad*, 78 Penn. St. 465; *Strasburg Railroad v. Echternacht*, 21 Penn. St. 220. An offer of reward made by public proclamation may be withdrawn in the same manner, and the fact that a claimant of the reward was ignorant of the withdrawal of the offer is immaterial. *Shuey v. United States*, 92 U. S. 73. And if not withdrawn by any express notice, a withdrawal is implied after the lapse of a considerable time. *Loring v. Boston*, 7 Met. 409.

In the present case, it seems to us that Henry Tower was a proper person to whom a withdrawing subscriber might give notice of his withdrawal. So far as appears in the bill of exceptions, there was no other officer or person who so well or fully represented the subscribers at large. He was at the head of the principal committee, and in addition to this he had been selected and chosen as president, and he was acting in behalf of the subscribers. There is nothing to show that the chairman of the meetings had any duties except merely as presiding officer at the meetings. Taking the case as it stood, and in view of the requests for instructions which implied that the notice of withdrawal would of course be given to some officer, and of the fact that nobody else was suggested as the proper officer or person to receive the notice, the ruling of the court was right, that notice to him was sufficient; and the fact that the association did not come into legal existence as a fully formed corporation till a later date does not render the notice to him insufficient, under the circumstances.

The plaintiff requested a ruling that the defendants could not withdraw after the associates had taken action on the strength of their subscription. This was rightly refused, as was held in the former decision.

The plaintiff also asked an instruction that the defendants' offer was not conditional, and could not be made so by oral testimony. This instruction was given.

The evidence to which the plaintiff objected was properly

admitted for the purpose for which it was received,* and the instructions to the jury carefully limited it to that purpose, and confined the attention of the jury to the single point of the defendants' withdrawal of their subscription.

Exceptions overruled.

JOHN S. JACOBS vs. CYRUS M. CARPENTER & another.

Suffolk. January 17, 1894. — March 2, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Promissory Note — Discharge in Bankruptcy — New Promise by Debtor.

If a creditor who has proved his debt, which is evidenced by a promissory note, and received a percentage thereof under composition proceedings in bankruptcy, delivers the note to the debtor as a loan upon his promise to return it, the subsequent return by him of the note does not, it not being so intended, amount to a new promise in writing by the debtor, within Gen. Sts. c. 105, § 3, (Pub. Sts. c. 78, § 3,) which will avoid the defence of a discharge in bankruptcy in an action upon the note.

The mere payment by a debtor, who has received a discharge in bankruptcy, of a sum on account of a debt which has been discharged, and which is evidenced by a promissory note, is not sufficient to raise the implication of a promise, within Pub. Sts. c. 78, § 3, such as will avoid the defence of the discharge in an action upon the note.

A debtor, after his discharge in bankruptcy, wrote to his creditor, "Enclosed please find our check for" a sum named "as an instalment of a long deferred promise; our regret is that it is not larger, but as opportunity presents itself you may be assured that you will not fail to receive tangible evidence of the purity of our intentions"; and later, "Enclosed please find our bill for" a sum named "received, together with our check for" another sum named "to be applied to old matters." Held, in an action on the debt, that the letters did not contain a new promise in writing by the debtor, within Pub. Sts. c. 78, § 3, which would avoid the defence of the discharge.

* The evidence in question was the conversation between the solicitor of the subscription and the defendant Herman C. Tower when he made the subscription; the statements made by the solicitor at a meeting of the associates on August 14, 1889, in regard to the nature of the defendants' subscription; the conversation between Herman C. Tower and Henry Tower on August 31, 1889, tending to show a revocation of the subscription if the associates voted to place a mortgage on the property; and the passing of such a vote at a meeting of the associates on August 31. The judge admitted the evidence solely for the purpose of showing a withdrawal of their subscription by the defendants before the corporation was organized.

CONTRACT, against Cyrus M. Carpenter and Benjamin P. Lovejoy, surviving partners of the firm of Cyrus Carpenter and Company, upon three promissory notes, the first for \$1,036.50, dated July 3, 1875, the second for \$1,040, dated September 20, 1875, and the third for \$1,040, dated September 23, 1875, each payable six months after its date to the plaintiff, and signed "Cyrus Carpenter & Co." The answer, among other defences, set up a discharge in bankruptcy. Trial in this court, before *Barker, J.*, who allowed a bill of exceptions, in substance as follows.

The notes in suit were given for money lent to the defendants at the date of the notes. The firm of Cyrus Carpenter and Company consisted at that time, and up to April, 1893, when Cyrus Carpenter died, of Cyrus Carpenter and the defendants. It appeared that, after the notes were given, the firm of Cyrus Carpenter and Company, on November 5, 1875, filed a voluntary petition in bankruptcy in the United States District Court; that the schedules filed, duly signed and sworn to by each partner, contained the name and the residence of the plaintiff as a creditor of the firm for the amount of the notes; that on November 23, 1875, an offer of composition was duly made by the firm, which was duly assented to in writing by the requisite number and amount of their creditors, including the plaintiff; that such composition was duly confirmed and recorded by the court, and the defendants were thereby discharged from liability on the notes; and that the plaintiff, with other creditors, signed the following acknowledgment and discharge: "We the undersigned, creditors of Cyrus Carpenter & Co., hereby severally acknowledge the receipt of the sums set against our respective names, in full satisfaction and discharge of our claims against them, the same being paid and received in performance of the resolution of composition in case of said Cyrus Carpenter & Co. in bankruptcy, recorded by the District Court for the District of Massachusetts on the fourth day of December, 1875. This receipt is not to impair or affect in any way the liability of any other parties upon any obligations we now hold against said Cyrus Carpenter & Co." Each of the notes was in the handwriting of Cyrus M. Carpenter, and, when produced in evidence from the possession of the plaintiff, bore the indorsement, "Received on

the within ten per cent in settlement of composition act," which was in the handwriting of Cyrus M. Carpenter, and to which no signature of the plaintiff appeared; these indorsements were made prior to their return to the plaintiff, and the plaintiff testified that they were not put on with his knowledge or direction.

The plaintiff sought to avoid the discharge of the defendants thus obtained in bankruptcy, on the ground that there was a new promise binding on them subsequently to those proceedings. He testified that, subsequently to the bankruptcy proceedings, he had received from the hand of Cyrus Carpenter several payments, which he had applied on the notes and receipted bills for merchandise which he had purchased of the firm of Cyrus Carpenter and Company, which bills were made out by Cyrus M. Carpenter and receipted in the handwriting of Cyrus Carpenter, and the amount of which the plaintiff had applied toward the payment of these notes; and that, accompanying one of such payments, he received a letter, dated January 13, 1881, in the handwriting of and signed by Cyrus Carpenter in the firm name, containing the following: "Enclosed please find our check for three hundred (\$300.00) dollars, together with a receipted account for \$25.10 as an instalment of a long deferred promise; our regret is that it is not larger, but as opportunity presents itself you may be assured that you will not fail to receive tangible evidence of the purity of our intentions." He also testified that accompanying one of the receipted accounts was a letter, dated January 28, 1888, in the handwriting of and signed by Cyrus Carpenter in the firm name, the material part of which was as follows: "Enclosed please find our bill for \$54.23 receipted, together with our check for \$150.00 to be applied to old matters."

On cross-examination, he testified that in 1875 he knew that the firm went into bankruptcy; that he never had any claims against them at that time or since except these three notes; that the notes were held by him at the time of their going into bankruptcy, and he lent them at that time to Cyrus Carpenter, who promised to and did return them to him; that he never had any conversation with reference to the notes or their payment except with Cyrus Carpenter; and that he never

received any communication signed or purporting to be signed by the firm where the signature was in the handwriting of any other person than Cyrus Carpenter.

On redirect examination, he testified that he received the notes back from Carpenter within a month after the bankruptcy proceedings; and that, when Carpenter handed back the notes, he said that every dollar should be paid, and if the plaintiff wanted any goods out of the store at any time it was all right.

On recross-examination, he testified that he never spoke to the other partners about that conversation until after Cyrus Carpenter died; that he did not understand that he released him or discharged him from his debt; and that he supposed the notes were good all the time.

Cyrus M. Carpenter, one of the defendants, testified that he never signed or made any agreement in writing to pay these notes notwithstanding his discharge in bankruptcy; that he never authorized any one else to do so, or to deliver any written instrument that would be a new agreement to pay the notes after his discharge in bankruptcy; that he never knew up to the time of his father's death that it was pretended by the plaintiff that the notes were good for the full amount; that during all those years he never had a word with the plaintiff with reference to this matter, except the time that he paid him the dividend; and that he did not know that these letters of his father had been written to the plaintiff until this action was brought.

Benjamin P. Lovejoy, one of the defendants, testified that he knew of the payment of the composition dividend to the plaintiff; that from that time up to the time of the death of Cyrus Carpenter, he had no knowledge that the plaintiff intended to hold these notes against the firm; that he never had any conversation with the plaintiff in reference to them from the time of the discharge in bankruptcy up to the time of Cyrus Carpenter's death; that he never agreed to pay them, nor authorized any one else to pay them; that he did not know that any pretence was made that a new promise had been made, either by the delivery of the notes or a written instrument or letter; that the first he heard of this new claim was since the death of Cyrus Carpenter; that he never knew of the writing of these letters up to the death of Cyrus Carpenter; and that he never

authorized Cyrus Carpenter to sign these letters on his behalf, and had no knowledge of them.

At the close of the evidence, having ruled that the discharge of the defendants in bankruptcy, as shown by the evidence, would bar the present action, the judge ruled that there was no sufficient evidence that the notes were made new notes by the redelivery of them, so as to bind the defendants, and made the following ruling: "I assume that these notes were properly made and good notes originally; but I rule that, although there is evidence on which the jury might find that it was the intention on the part of the promisors to pay these notes after bankruptcy, they might find actual payments on account of the notes, they might find that the letters referred to these notes, but still there is no evidence of a promise to pay that would bind them to pay"; and ordered a verdict for the defendants. The plaintiff alleged exceptions.

J. T. Wilson, for the plaintiff.

H. G. Allen, for the defendants.

ALLEN, J. By Gen. Sts. c. 105, § 3, re-enacted in Pub. Sts. c. 78, § 3, it was necessary for the plaintiff to show a new promise in writing. The return by Carpenter of the notes did not amount to such new promise, and it was not intended to be such. The plaintiff had the rightful possession of them. The payment of the percentage under the composition did not entitle the makers to have the notes surrendered to them. The plaintiff, having possession, lent them to Carpenter, who returned them, not as new notes or notes having any new force by reason of such return, but as documents belonging to the plaintiff which he had borrowed and promised to return.

The subsequent payments were not a new promise in writing. *Cambridge Institution for Savings v. Littlefield*, 6 Cush. 210. *Merriam v. Bayley*, 1 Cush. 77. And the letters contained no new promise. *Bigelow v. Norris*, 189 Mass. 12; *S. C.* 141 Mass. 14. *Dennan v. Gould*, 141 Mass. 16. *Kenney v. Brown*, 189 Mass. 345. *Elwell v. Cumner*, 186 Mass. 102.

Exceptions overruled.

JOSEPH H. BLATT vs. ANN MCBARRON.

Suffolk. November 21, 1893. — March 3, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Officer — Trespass — Defective Premises — Action.

A constable who, for the purpose of serving a civil process, enters upon premises which he supposes are occupied by the person whom he is seeking, but which are occupied by another, who does not induce him to enter, is a trespasser if the person whom he seeks is not in fact there, and cannot maintain an action against the owner of the premises for personal injuries occasioned by a defect therein.

TORT, for personal injuries occasioned to the plaintiff, a constable of the city of Boston, by a defect in the defendant's premises, upon which he had entered for the purpose of serving a civil process. Trial in the Superior Court, before *Sherman, J.*, who directed the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside and the case to stand for trial. The facts appear in the opinion.

E. Greenhood, (*A. S. Cohen* with him,) for the plaintiff.

E. N. Hill, for the defendant.

BARKER, J. The plaintiff contends that he had a right to enter the defendant's building because he was a constable qualified to serve civil process and had in hand for service a writ against a person who, as he supposed, resided in the building, but who in fact did not live there, but in another house on the opposite side of the street, and who was not in the building which the plaintiff entered. The defendant was a stranger to the process which the plaintiff was undertaking to serve, and it is not contended that she had in any way induced the plaintiff to believe that the person against whom the process ran was in the building which the plaintiff entered, nor that he had ever been in any way connected with that building.

Under these circumstances we are of opinion that the plaintiff had no right to enter the defendant's building, and that in entering it he was a trespasser. This conclusion does not rest upon

the fact that the building was a dwelling, nor that the entrance to it was closed. It was in fact a tenement house, not occupied by the defendant but by tenants at will, and the entrance by which the plaintiff gained admission was not only open, but had no door. The plaintiff was a trespasser, because his office and his writ gave him no right to enter upon the property of a stranger, unless the person whom the writ directed him to serve with a summons either resided there or was actually in the building.

While it is for the public interest that officers charged with the duty of serving civil process should be clothed with such powers as will enable them to comply with their precepts, it yet is not necessary that they should have the right to enter any premises where they may suppose the person to be of whom they are in search; and if, without inducement from the owner or those in occupation, they see fit to enter a building where the person sought does not reside, they are properly held to do so at their peril, and if he is not in fact there they enter without right and as trespassers. In this respect their rights and powers are less than those of officers charged with the execution of warrants to arrest alleged criminals, or of those whose duty it is to arrest criminals without warrant. In such cases the officer may enter the house of a stranger and search there for the person named in his warrant, although that person is not there, if the officer has reasonable cause to believe that the person against whom he holds the warrant, or whom it is his duty to arrest without a warrant, is in the house. *Commonwealth v. Irwin*, 1 Allen, 587. *Commonwealth v. Reynolds*, 120 Mass. 190. *Parker v. Barnard*, 135 Mass. 116, 117. But there is a clear distinction, both upon principle and authority, between such cases and those in which officers charged only with the service of civil process invade the premises of strangers, which do not in fact shelter those of whom they are in search. In such cases they act at their own risk, and are justified or shown to be trespassers by the event. And such is the current of authority. Thus in *Biscop v. White*, Cro. Eliz. 759, trespass was brought for breaking the plaintiff's house. The defendant held a *fieri facias de bonis testatoris*, and, the plaintiff's house being open, entered to levy the debt. There were in the house *bona propria executricis*, not liable to execution,

but no *bona testatoris*, and the plaintiff had judgment; but if *bona testatoris* had been in the house, it was conceived that the plaintiff's entry would have been justifiable. So in Com. Dig. Execution (C.5), it is said: "After a *feri facias* delivered to him, the sheriff may enter the house of the defendant, when the door is open, and seize the goods of the defendant there found; or the house of a stranger; and this by night or by day, if the door be open. But if it be the house of a stranger he ought to aver that the goods were there." In *Cooke v. Birt*, 5 Taunt. 765, Gibbs, C. J. says: "Under a *feri facias* the sheriff cannot, on suspicion of finding the defendant's goods, enter the house of a stranger. . . . The sheriff, finding the door open, may enter the house of a stranger, and is justified if the defendant's goods are in it, but it is at his own risk." And in the same case Dallas, J. says: "The sheriff may enter the house of a stranger, if the door be open, but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser." So in *Johnson v. Leigh*, 6 Taunt. 246, the defendant's plea, averring only a suspicion that the person whom the defendant sought to arrest on mesne process was in the plaintiff's house, was held bad. And in *Morrish v. Murrey*, 13 M. & W. 52, it was held that an officer was not justified in entering and searching the house of a stranger for the purpose of arresting a debtor under a *capias ad satisfaciendum*, although the debtor had resided there before the entry, and the officer had reasonable cause to suspect that the debtor was there, if the debtor was not in the house at the time. See also *Semayne's case*, and notes in 1 Smith's Lead. Cas. (9th Am. ed.) 228, 234-245. In *Platt v. Brown*, 16 Pick. 553, 556, the officer had the right to break open the plaintiff's store for the purpose of attaching the goods of a third person, because the goods were in fact there.

As in our opinion the plaintiff was a trespasser upon the defendant's property, and had no lawful right or license of any kind to enter her building, there is no occasion to inquire whether the city ordinances stated in the report applied to the entrance where the plaintiff fell, or whether, if he had not been a trespasser, but had entered under license or of right, he could have recovered for his injuries under the doctrine held in the case of *Parker v. Barnard*, 135 Mass. 116. Nor whether, if he

had not been a trespasser, he could have been found to be in the exercise of ordinary care in entering a dark passage with which he was unacquainted, and walking forward until he fell down stairs.

Judgment on the verdict.

JAMES ROUGHAN vs. BOSTON AND LOCKPORT BLOCK
COMPANY.

Suffolk. November 23, 1893. — March 3, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

*Sale — Breach of Warranty — Personal Injuries — Master and Servant —
Defective Appliance — Damages.*

If A. buys of B., an experienced manufacturer, with whom he has long dealt, an appliance which he is assured is the best for the purpose for which it is intended, which is of a kind that he has used before in his business, and which, while being used in the proper and ordinary manner in doing the work for which it is designed, breaks, by reason of a hidden flaw which could not have been detected upon a careful inspection, within two months after it is put in use, while in the ordinary course of wear it should have lasted for years, and the accident injures, while in the regular discharge of his duties and without his fault, a servant of A., who, without suit and without notice to B., compensates the servant for his injuries, A. cannot recover, in an action against B. for breach of warranty in the sale, the amount so paid as compensation to his servant.

CONTRACT, for an alleged breach of warranty in the sale of a certain block manufactured for and sold to the plaintiff by the defendant. Trial in the Superior Court, before *Richardson, J.*, who directed the jury to return a verdict for the plaintiff in the sum of \$15.25; and reported the case for the determination of this court. The facts appear in the opinion.

F. E. Fitz, for the defendant.

H. N. Sheldon, for the plaintiff.

BARKER, J. The defendant now concedes that judgment should be entered on the verdict, which was the amount agreed by the parties to be the diminished value of the block by reason of the breaking; but the plaintiff contends that he should also recover the sum which he has paid to his servant as compensation for his injury occasioned by the breaking of the block, and

this is the only question for decision. That sum was paid without suit, and without communication with the defendant, and the plaintiff cannot recover it in this action, whatever warranty there may have been upon the sale to him of the block, unless he was upon the facts stated in the report himself liable to his servant for the injury. And we are of opinion that he was not so liable, no evidence of negligence or fault on his part toward the servant being shown in the report.

The block broke a month or two after it was put in use, in doing the work for which it was designed, while in the ordinary course of wear it should have lasted for years. When the block gave way it was discovered that there was a flaw, to which presumably the breaking was due, and which before the break was hidden by other parts of the block. The defendant was an experienced manufacturer of such implements, and the plaintiff had been in the habit of buying blocks of the defendant for years. When this block was ordered, the plaintiff asked for the best coal-hoisting block the defendant had made, and looked through the store and examined the catalogue, and ordered the block which he was assured was the best for the purpose, and it was of a kind which he had used before. When the block gave way it was being used in the proper and ordinary manner. It is conceded that the servant was not himself in fault, and that he received his injury in the regular discharge of his work. These are all the circumstances stated in the report which bear upon the question whether the plaintiff was liable to his servant, or whether that question ought to have been submitted to the jury.

The plaintiff was not under an absolute obligation to his servant that the block should not break. His duty was to use reasonable care to procure and keep safe appliances; and if he discharged his duty in these particulars, and the block gave way without his fault, he was not liable to his servant, who took as one of the risks of his employment the chance of injury from apparatus which his employer had used due care in procuring, and in keeping in such condition as to be safe. The facts stated in the report are susceptible of only one general inference, namely that in ordering from an experienced manufacturer the best block for the purpose for which it was to be used, and in keeping it in use for that purpose in the proper

and ordinary manner for not more than two months, when it should have lasted for years, he was not in fault, either in procuring the block, or in keeping it in use, when it gave way from a flaw which had been hidden, and which it is plain would not have been detected upon careful inspection. *Ladd v. New Bedford Railroad*, 119 Mass. 412. *Holden v. Fitchburg Railroad*, 129 Mass. 268. *Spicer v. South Boston Iron Co.* 138 Mass. 426, 430. The block was one of that class of implements which the employer is expected to buy; and the care he is bound to use in providing it is in making the selection, and includes such inspection as will detect defects which can be found by a careful inspection. But this does not require him to find a possible hidden flaw, the presence of which there is no reason to apprehend, and which is so concealed in the construction of the machine that it cannot be discovered by inspection, nor does it make him responsible for such a flaw in the block which he has purchased with due care. *Moynihan v. Hills Co.* 146 Mass. 586, 594.

This view of the case makes it unnecessary to consider whether there was an express or implied warranty that the block was proper and suitable, and properly constructed of suitable material for the hoisting of coal, and whether if there was a warranty the defendant would be liable upon it for damages which the plaintiff might be compelled to pay to a workman injured by his negligently furnishing it for his use or negligently allowing it to continue in use. On these points we express no opinion.

Judgment on the verdict.

JEREMIAH BUCKLEY, administrator, vs. OLD COLONY
RAILROAD COMPANY.

Bristol. December 6, 1893. — March 3, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Loss of Life — Railroad — "Passenger" — Action.

If a person, for the sole purpose of continuing his homeward journey on foot, knowingly and voluntarily leaves a railroad train, which has stopped at a place not designed for the discharge of passengers, a short distance from the station for

transportation to which he has paid fare, to await the passing of an express train approaching from the opposite direction, and the name of the station is not called, nor any express or implied invitation given to passengers to leave the train, he ceases to be a passenger; and if, in crossing the railroad tracks, he is killed by the other train, no action can be maintained, under Pub. Sts. c. 112, § 212, by the administrator of his estate against the railroad corporation for causing his death.

TORT, under Pub. Sts. c. 112, § 212, by the administrator of the estate of Daniel J. Buckley, for causing his death, while an alleged passenger on the defendant's railroad. Trial in the Superior Court, before *Dewey, J.*, who directed the jury to return a verdict for the defendant, and, at the request of the parties, reported the case for the determination of this court. If the ruling was right, judgment was to be entered for the defendant; otherwise, the case was to stand for trial. The facts appear in the opinion.

D. F. Buckley, for the plaintiff.

J. H. Benton, Jr., for the defendant.

BARKER, J. The plaintiff's intestate was killed by an express train which struck him as he was crossing the defendant's tracks in the rear of another train. There is no contention that, unless he was a passenger at the time, he was himself in the exercise of due care, but if he was a passenger it is not necessary to show that he was in the exercise of due diligence in order to recover under Pub. Sts. c. 112, § 212. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211.

We are of opinion that the deceased had ceased to be a passenger before he was struck by the express train, and that the verdict for the defendant was rightly ordered. The deceased had purchased his ticket for the Easton station, and had ridden in the train as a passenger until the train had nearly reached that station. The train had then been stopped a short distance from the station to await the passing of an express train approaching from the other direction. The name of the station had not been called, nor any express or implied invitation given to passengers to leave the train where it then stood; but the stop was one which the deceased must have known was for some purpose other than the discharge of passengers. It is not contended that he left the train for any purpose except to pursue his homeward route on foot, and he had less distance to travel on foot, if he

left the train where it stopped, than if he rode to the station. No witness was called who saw him on the train, but it was admitted that he bought a ticket for Easton and took the train and rode in it until near that station. Upon this state of the case there was no possible conclusion except that he knowingly and voluntarily left the train, at a place not designed for the discharge of passengers, for the sole purpose of continuing his homeward journey on foot. When he so left his car he thereby terminated his relation to the defendant as a passenger, and it was under no obligation to him to afford him a safe path on his further progress. See *Frost v. Grand Trunk Railroad*, 10 Allen, 387. As held in *Commonwealth v. Boston & Maine Railroad*, 129 Mass. 500, "If he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of travelling further." The deceased was not injured in leaving the train, but in pursuing his own course on foot at a point distant from the place where he alighted, so that there is no occasion to consider the question raised in *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, whether the defendant ought to have prevented him from leaving the train or have warned him not to do so. It gave him no invitation to alight, and is not responsible for his voluntary act. The case so differs in its facts from that of *Boss v. Providence & Worcester Railroad*, 15 R. I. 149, on which the plaintiff relies, that there is no occasion to discuss that decision. There the plaintiff testified that he supposed the train had arrived at his station, and he was hurt while leaving it in the manner usual at that station.

Judgment on the verdict.

THOMAS NILES & another vs. SUSAN H. ALMY & others.

Suffolk. December 12, 1893. — March 3, 1894.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

Devise and Legacy.

A testator, at the time his will was made, had four sons, four daughters, and children of a deceased daughter living. By his will, he gave two equal ninth parts of the residue of his estate to his two sons A. and B., in fee, and the other seven equal ninth parts thereof to A. and B. and the husband of the deceased daughter in trust, to invest the same and pay the income of one of such equal ninth parts respectively to each of his four daughters, to each of his two sons C. and D., and to the children of the deceased daughter, during their respective lives, "and if either of the beneficiaries of the said trust shall die leaving no issue surviving, then it is my will that the portions herein given for the benefit of said deceased be equally divided among the others, the issue of any deceased child taking the same proportion as that the parent would have taken if living, and the children of" the deceased daughter "taking an equal share with one of her said eight brothers and sisters." C. died after the testator's death, leaving no issue. Held, that C.'s share of the trust fund was to be divided into eight equal parts, and A. and B. were each entitled to one of such parts.

LATHROP, J. This is a bill in equity, brought by the surviving trustees under the will of Thomas Niles, to obtain the instructions of the court as to the construction to be given to the third clause of the will. At the time the will was made the testator had four sons and four daughters living, and the children of a deceased daughter, Mrs. Sarah M. C. Cn. Rogers. The third clause of the will is as follows:

"Thirdly all the rest & residue & remainder of my estate Real & personall I give devise & bequeath as follows two equal Ninth parts to my two Sons Thomas Niles Jr & William J Niles 2d in equal portions to each to have & hold the same to them & their respective heirs forever & the other Seven Equal Ninth parts thereof to my son Thomas Niles Jr William J. Niles 2d & John Kimball Rogers Husband of my late Daughter Sarah M. C Cn Rogers & their heirs forever & the Survivor of them & his heirs as joint Tenants in trust. Nevertheless for the following uses & purposes to wit. To invest the Same & keep the same changing the investment whenever they shall judge necessary or advisable with full power to sell & convey & sell the per-

sonal Estate only except as hereafter provided & to pay the income to one of said Equal Ninth parts to each of my four Daughters Susan H. Almy Mary J. Niles Alice Niles Roberts & Anna Rhoda Niles during their respective lives free from the interference or control of their present or future Husbands & the income of one of said Equal Ninth parts to each of my two Sons Franklin Howard Niles & Washington Allston Niles during their respective lives & the income of the other undivided Ninth part to the children of my late Daughter Sarah M C Cn Rogers in equal proportions during their respective lives & if either of the beneficiaries of the said trust shall die leaving no issue surviving, then it is my will that the portion herein given for the benefit of said deceased be equally divided among the others, the issue of any deceased child taking the same proportion as that the parent would have taken if living & the children of the said Sarah M. C. Cn Rogers taking an equal share with one of her said Eight Brothers & Sisters & the portions so coming to the said Susan H. Almy Mary J. Niles Alice Niles Roberts Franklin Howard Niles Washington Allston Niles & Anna Rhoda Niles & the children of the said Sarah M C. Cn Rogers to be held in trust by the said trustees as aforesaid & on the death of any one of the beneficiaries leaving surviving issues his or her portion shall be paid over to such issue."

Franklin H. Niles has died since the death of the testator, leaving no issue, and the question before us is whether his share of the trust fund should be divided into six parts or into eight parts; in other words, whether the two sons who were given their portions in fee, are entitled to share with the beneficiaries under the trust, or whether the latter alone are entitled to take. The question is not free from difficulty. The will is inartificially drawn, and the intention of the testator is not readily ascertainable. The language of the will is: "And if either of the beneficiaries of the said trust shall die leaving no issue surviving, then it is my will that the portion herein given for the benefit of said deceased be equally divided among the others." Who are meant by the word "others"? Does this word refer merely to "the beneficiaries of the said trust," the next preceding antecedent, or does it refer to those beneficially entitled under the residuary clause? If the will stopped here, there

would be much room for doubt. But, in our opinion, the ambiguity is removed by the words that follow: "The issue of any deceased child taking the same proportion as that the parent would have taken if living & the children of the said Sarah M. C. Cn Rogers taking an equal share with one of her said Eight Brothers & Sisters." The testator here clearly manifests his intention that the portion of a beneficiary of the trust dying without issue should be divided equally among all the surviving children of the testator and the issue of any deceased child, such issue taking *per stirpes*.

The general intent of the testator, as shown by the division of the residue of his estate into shares, is equality. When this intent appears, ambiguous words and phrases should be construed, if possible, to carry out this intent. *Minot v. Taylor*, 129 Mass. 160. *Bowker v. Bowker*, 148 Mass. 198. *Balch v. Pickering*, 154 Mass. 363. The fact that in the case before us the shares of some of the children are directed to be held in trust, while other shares are given absolutely, does not prevent the operation of the principle of equality. *Williams v. Bradley*, 3 Allen, 270. *Stedman v. Priest*, 103 Mass. 293.

It was suggested at the argument that the words, "And if either of the beneficiaries of the said trust shall die leaving no issue surviving, then it is my will that the portion herein given for the benefit of said deceased be equally divided among the others" should be read parenthetically. This would make the rest of the clause apply merely to that part which precedes the words quoted, and would make a large part of the rest of the clause unnecessary, and mere repetition, a construction which is not to be favored. We are therefore of opinion, that the second clause of the decree appealed from must be modified in accordance with this opinion.*

Decree accordingly.

A. Blume, for the plaintiffs, read the papers in the case.

W. G. Russell & J. Fox, for Thomas Niles and William J. Niles.

G. W. Estabrook, for Frank K. Rogers, a grandson of the testator.

H. W. Chaplin, guardian ad litem, for certain minor defendants.

O. B. Mowry, for the guardian of other minor defendants.

* The clause of the decree in question directed the trustees to divide the one seventh portion of the trust fund given by the will to Franklin H. Niles into six equal parts.

BOSTON & ALBANY RAILROAD COMPANY vs. INHABITANTS
OF CHARLTON.

Worcester. October 6, 1893. — March 5, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Grade Crossing — Land Damages — Counsel Fees — Expenses of Selectmen.

An auditor appointed under the provisions of St. 1890, c. 428, § 7, found that certain sums of money paid by a town for counsel fees, and for extra services of the selectmen in defending and settling claims for damages for land taken by the town for the purpose of abolishing a crossing at grade of a public way therein and a railroad, were just and reasonable. *Held*, that these items were improperly disallowed by the Superior Court.

FIELD, C. J. The directors of the Boston and Albany Railroad Company presented a petition to the Superior Court, under the first section of St. 1890, c. 428, for the abolition of three grade crossings in the town of Charlton, and, as appears from the report of the presiding justice, commissioners were duly appointed who reported "in favor of the abolition of said crossings, and the way and manner of changing and separating the grades at said crossings, and their report was duly accepted by the court. In carrying out the provisions of said report it was necessary to take the land of various persons whose names appear in the auditor's report in this case." This land was taken for the alteration of the grade of public ways, and by the fifth section of the statute it was primarily to be paid for by the town, and in case the parties interested could not agree upon the damages either party had the right to have the damages determined by a jury in the Superior Court in the same manner as damages are determined for the taking of land for the laying out of public ways. The report of the case to this court also states as follows: "The town of Charlton employed counsel to settle land damage claims in cases where the parties refused to accept the amount assessed by the selectmen, and to defend petitions brought against said town to recover damages for the taking of land. All claims, including such suits, were settled for sums satisfactory to the railroad and the Commonwealth. The charges of counsel for services in settling claims, appearing in, and preparing the defence in said suits, amounted to \$150,

which sum was found by the auditor to be reasonable in amount and [was] allowed by him in his report." There also appears in the auditor's report an allowance of the sum of \$39, being cash paid by the town to its three selectmen "for extra services . . . for defending and settling suits for land damages," which the auditor found to be "just and proper." The presiding justice disallowed both these items, on the ground "that the statute does not provide for including such items as counsel fees and services of selectmen in the cost of the alterations."

The third section, among other things, provides as follows: "The railroad companies shall pay sixty-five per centum of the total actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages, including those mentioned in section five of this act; and the said commission shall apportion the remaining thirty-five per centum of said cost between the Commonwealth and the city or town," etc.

The seventh section provides as follows: "The court shall appoint an auditor, . . . to whom shall from time to time be submitted all accounts of expense, whether incurred by the railroads, city, town, commission, or auditor, who shall audit the same and make report thereon to the court; which auditing, when accepted by the court, shall be final," etc.

The argument is that the enumeration in the third section of the items to be included in the cost to be paid must be taken to exclude other expenses, such as those incurred in defending suits for land damages. It is suggested that by the Public Statutes the prevailing party will recover his costs of suit, and that these are presumed to be all the costs of suit which the law intends should be paid in the absence of special provision for counsel fees and expenses. But we have been shown no provision of statute which declares how, in such a case as this is, it can be determined which is the prevailing party. Either party may apply to the Superior Court for a jury, if they cannot agree upon the damages. There is no previous award such as is made a condition of awarding costs in Pub. Sts. c. 49, § 105. See *Gifford v. Dartmouth*, 129 Mass. 135; St. 1881, c. 122.

It is apparent, we think, that the Legislature in St. 1890, c. 423, has not specially provided for counsel fees and other charges

incurred in prosecuting or defending land damage suits, and the question in dispute must be determined by analogy, and by considering the main purpose of the provisions concerning the expenses to be borne by the railroad company, the Commonwealth, and the cities or towns. The land to be taken must either be taken for the alteration of the railroad or of the public ways; if taken for the railroad, the railroad primarily pays the damages for the taking; if taken for a public way, the town or city pays the damages. If the landowner and the railroad company, or the city or town, as the case may be, cannot agree upon the damages, then either party may apply for a jury, etc. There necessarily must be suits for land damages unless the parties agree, and some expenditures for counsel, witnesses, plans, and other things must be necessary if the suits are to be efficiently prosecuted. The effect, of course, of disallowing the items mentioned would be to make it for the interest of a city or town hereafter not to contest the claims of landowners for damages unless they appear to be in excess of what a jury would probably give by at least ten times what it would cost the city or town to try a suit for damages, because not more than ten per cent of the whole expense of making the change of grade can be charged upon the town. St. 1890, c. 428, § 3. It would be bad policy to give such a construction to the statute unless it is absolutely required. The general purpose of the sections of the statute we have cited is, that the whole cost or expense of the entire work, including the cost of the commission and of the auditor, should be paid by the railroad company, the Commonwealth, and the city or town. Legal expenses may be unavoidable, and if reasonably incurred we think that they must be held to have been incurred for the benefit of all in the proportions in which the general cost or expenses are to be borne, and that they should be allowed.

We do not know what the extra services of the selectmen were, for which the town has paid. We must assume from the finding of the auditor that this was a proper payment, and we think that the sum paid should be allowed. See *New Haven & Northampton Co. v. Hayden*, 117 Mass. 433; *Lindsey v. Parker*, 142 Mass. 582.

Decree accordingly.

R. B. Dodge, Jr., for the respondent.

F. P. Goulding, for the petitioner.

ERNEST W. PERRY vs. EDWARD BANGS & another.

THOMAS W. SOUTHARD vs. SAME.

Suffolk. November 21, 1893. — March 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Neglect of Owner of Hotel to provide Means of Escape from Fire — Liability to Action — Statute.

The owner of a hotel cannot be said to have violated the provisions of St. 1888, c. 426, § 1, so as to be liable to an action, under § 12, for injuries occasioned by his neglect to provide proper and sufficient ways of egress or other means of escape from fire, until after the inspector of buildings has decided what ways of egress or means of escape are in his opinion necessary, and has given notice thereof in writing to the owner, specifying the same, and the owner has neglected or refused to comply with the order of the inspector.

FIELD, C. J. These two actions are by different plaintiffs against the same defendants; the declarations are the same in both, and the demurrers are the same. The actions are brought under St. 1888, c. 426, §§ 1 and 12, and the allegations are in substance that the defendants were the owners of a hotel in the city of Boston "in which ten or more persons were lodging and residing above the second story"; that said hotel was not provided "with proper ways of egress or other means of escape from fire, sufficient for the use of all persons accommodated, assembling, employed, lodging, and residing in said hotel, and that the defendants neglected to supply the same"; that the plaintiffs were guests at said hotel, "lawfully and properly lodging therein, above the second story"; that on March 29, 1892, a fire "broke out in said hotel, and the same was burned"; and that during said fire the plaintiffs, while in the exercise of due care, were injured by reason of the failure and neglect of the defendants to provide "proper and sufficient ways of egress or other means of escape from fire from said hotel."

It is necessary to examine in detail the provisions of the statute. The act was passed for the whole Commonwealth, and was to be enforced by the inspectors of factories and public buildings assigned to such duty by the chief of the district police force in all places but the city of Boston, and in the city of

Boston by the inspector of buildings. The act went into effect on July 1, 1888. . The sections of the act from one to eight inclusive were repealed, so far as they relate to the city of Boston, by St. 1892, c. 419, § 138, but the repeal was some time after the fire in the present cases is alleged to have occurred.

Section 1 of St. 1888, c. 426, first describes the buildings to be subject to the provisions of the act, and this description includes "every hotel, family hotel, apartment house, boarding house, lodging house, or tenement house in which ten or more persons lodge or reside above the second story." The description ends as follows: "and every factory, workshop, mercantile or other establishment the owner, lessee, or occupant of which is notified in writing by the inspector hereinafter mentioned that the provisions of this act are deemed by him applicable thereto, shall be provided with proper ways of egress or other means of escape from fire, sufficient for the use of all persons accommodated, assembling, employed, lodging, or residing in such building." We assume that the words requiring a notice in writing from the inspector that he deems the provisions of the act applicable to certain establishments apply only to the buildings or establishments mentioned in the last clause of the description, and that a hotel in which more than ten persons lodge or reside above the second story is subject to the provisions of the act, even if no such notice has been given by an inspector. The first section then goes on to require that certain things shall be done if the inspector shall "so direct in writing," and it ends with certain absolute requirements concerning portable seats in the aisles and the passageways of any building subject to the provisions of the act during any service or entertainment, and concerning the proscenium or curtain opening of all theatres.

The second section makes it the duty of the inspector to examine all buildings subject to the provisions of the act within the city of Boston. If, in his judgment, any such building conforms to the requirements of the act, he is required to issue to the owner, lessee, or occupant his certificate to that effect, "specifying the number of persons for whom the ways of egress or means of escape from fire are deemed to be sufficient." Such certificate, while it continues in force, is conclusive evidence of a compliance with the provisions of the act, but becomes of no

effect if more persons than the number specified are accommodated or lodged in the building, or if the building is used for a materially different purpose, or the internal arrangements of the building are materially altered, or the ways of egress or means of escape are rendered unavailable or are materially changed.

By § 3, upon application for the granting of such a certificate, the inspector is required to issue an acknowledgment of such application, which for a certain length of time pending the granting or refusal of a certificate has the same effect as a certificate.

By § 4, when a certificate has been issued, and a change is made in the premises or in the use thereof which terminates the effect of the certificate, it is the duty of the person making the change to give notice thereof to the inspector.

By § 5, if the inspector finds that any building subject to the provisions of the act fails to conform thereto, or that any change has been made which terminates the effect of the certificate, it becomes his duty "to give notice in writing to the owner, lessee, or occupant of such building, specifying and describing what additional ways of egress or means of escape from fire are necessary" in his opinion.

By § 6, in case any such building is owned, leased, or occupied jointly or severally by different persons, any one shall have the right to apply to any part of the outside of the building "any ways of egress or means of escape from fire specified and described by an inspector as above provided, notwithstanding the objection of any other such owner, lessee, or occupant."

Section 8 contains an absolute prohibition against placing in any building which is subject to the provisions of the act any wooden flue or air duct for heating or ventilating purposes, and against placing any pipe for conveying hot air or steam nearer than one inch to any woodwork, unless protected to the satisfaction of the inspector by suitable guards or casings of incombustible material.

Section 9 contains an absolute requirement that every story above the second, in buildings subject to the provisions of § 1, shall be supplied with means of extinguishing fire, which are described in the section.

By § 10 it is made the duty of the inspector to enforce the provisions of the act, and for that purpose there is given to him

the right of access to all buildings which are subject to its provisions.

By § 12 it is made the duty of every owner, lessee, or occupant of any of the buildings which are subject to the provisions of the act, to cause the provisions to be carried out, and if he fails to do so he is made subject to a fine, but it is provided that "no prosecution therefor shall be brought until four weeks after written notice from an inspector, as above provided, of the changes necessary to be made in order to conform thereto, nor then, if in the mean time such changes have been made in accordance with such notification." It is also provided that "any such owner, lessee, or occupant shall be liable for all damages caused by his violation of the provisions of this act," and there is a further provision that any person using or occupying a building contrary to the provisions of the act may be enjoined from such use or occupation.

This statute was amended by St. 1890, c. 438, which provided in effect for an appeal from any order of an inspector by an application to the Superior Court for an injunction against the enforcement of any such order.

This examination of the statute shows that, while certain of the requirements of the statute are specific and absolute, there is no specification in the statute of what shall constitute "proper ways of egress, or other means of escape from fire, sufficient for the use of all persons accommodated," etc. Perhaps from the nature of the subject, and the different kinds of buildings mentioned, their various sizes and uses, it was impossible to lay down any fixed rule applicable to all buildings described in the act. The first section, therefore, assumes that there will always be one way of egress, and provides that "every room above the second story in any such building in which ten or more persons are employed shall be provided, if the inspector mentioned in the following section shall so direct in writing, with more than one way of egress by stairways on the inside or outside of the building, placed as near as practicable at opposite ends of such room." The section then prescribes certain requirements concerning the stairways, if they are on the outside of the building, but it leaves it to the inspector to determine whether the additional stairways shall be on the inside or out-

side. The right given by the sixth section is limited to the "right to apply to any part of the outside of such building, and to sustain from any part of the outside wall thereof, any way of egress or means of escape from fire, specified and described by an inspector as above provided." The duty of the inspector by section five is to specify and describe "what additional ways of egress or means of escape from fire are necessary," etc., and his duty by the second section is to examine all buildings subject to the provisions of the act.

Whether proper ways of egress or other sufficient means of escape from fire are provided in any hotel is necessarily a matter upon which men may often differ in opinion, and we think it was not the intention of the act to leave it to a jury to determine after a fire whether there were proper ways of egress, or sufficient means of escape. We are of opinion that the intention was that the inspector should decide this question, and that only after the inspector has decided it, and has given notice in writing specifying what additional ways of egress or means of escape from fire are necessary, and the owner, lessee, or occupant has neglected or refused to comply with the order of the inspector, can it be said that the owner, lessee, or occupant has violated the provisions of the act concerning proper ways of egress or means of escape from fire. Whatever may have been the reason for enacting the third section, we are not convinced that its provisions were intended to contravene the general intent of the statute that the inspector should determine and direct in writing what ways of egress or means of escape from fire should be provided in addition to those already existing. After the passage of St. 1890, c. 438, the ultimate decision must be by the experts appointed by the Superior Court on an application for an injunction, if the person aggrieved by the order of the inspector makes seasonable application to that court. In no event is the sufficiency of the ways of egress or means of escape from fire to be determined by a jury. The question for a jury, so far as proper ways of egress or means of escape are concerned, is, whether the defendant has complied with the written directions of the inspector, or with these directions as modified on application to the Superior Court.

We have found it unnecessary to consider whether the limita-

tion upon prosecutions found in the twelfth section applies to actions for damages, or to determine other questions which may arise in an action against the owners of a building of which they were not in occupation at the time of the fire.

Judgments for the defendants affirmed.

J. D. Long & A. F. Butterworth, for the plaintiffs.

F. L. Hayes, (*E. A. Bangs* with him,) for the defendants.

ELLEN DURR & another *vs.* HARRISON G. O. CHASE.

Suffolk. December 4, 1893. — March 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Lease — Extrinsic Evidence — "Building."

An action was brought by a lessee against his lessor for a breach of the terms of a lease which recited that the lessor let "all the brick building recently erected by me on the northerly corner of S., P., and S. M. Streets in the said B., with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same." *Held*, that for the purpose of showing what building was covered by the lease oral evidence was competent to show where, at the time of the execution of the lease, the streets were, and what building was on the corner of these streets then recently erected by the defendant.

A lease recited that the lessor let "all the brick building recently erected by me on the northerly corner of S., P., and S. M. Streets in the said B., with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same." *Held*, that the fact that the corner building, which had been originally two buildings and had been converted into one by the removal of the partition wall, was originally designed by the defendant for three flats, but that prior to the execution of the lease, at the request of the plaintiff, it had been changed into lodgings, while the adjoining building on P. Street, which was separated from the corner building by a solid brick partition wall with no opening of any kind between the buildings, contained, above the store on the first floor, three suites of rooms adapted for housekeeping, warranted the finding that the lease did not include the latter building.

At the trial of an action by a lessee for a breach by the lessor of the terms of a lease in withholding a portion of the premises alleged to have been included in the lease, evidence that, prior to the execution of the lease, the plaintiff informed the agent of the defendant for what purpose he proposed to use the premises, is inadmissible.

At the trial of an action by a lessee for a breach by the lessor of the terms of a lease, in withholding a portion of the premises alleged to have been included in

the lease, evidence of the plaintiff, who had not qualified as an expert, of the fair average rental value of the rooms in that part of the building not occupied by him if he had furnished and occupied them for a lodging house, as well as what the same rooms would have been worth to him for the purpose of a lodging house if he had not paid any larger rent, is inadmissible.

In an action by a lessee against his lessor for a breach of the terms of a lease which recited that the lessor let "all the brick building recently erected by me on the northerly corner of S., P., and S. M. Streets in the said B., with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same," the plaintiff requested rulings, in substance, that the word "building" meant structure, and applied to and included all that structure erected by the defendant just prior to the date of the lease "on the northerly corner of S., P., and S. M. Streets in the said B." under one roof; that the word "building" could be so construed as to include one or more tenements in the same structure, although the different tenements therein might be separated and divided from the other parts by a partition wall; that the words of the lease referred to the entire structure owned by the defendant and recently erected by him on that corner, except such portions of the same as were specifically excepted from the operation of the lease, without regard to the manner in which it was partitioned or divided. The judge declined so to rule. *Held*, that the requests related to the meaning of the description of the premises in the lease as applied to the building and land, and could not be given as pure matters of law, independently of any evidence relating to the building on the corner of the streets mentioned, and that the plaintiff had no ground of exception.

CONTRACT, for the breach of the terms of a lease. Trial in the Superior Court, without a jury, before *Thompson*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that shortly before October 1, 1887, the plaintiffs, seeing a structure in process of erection at the corner of Staniford, South Margin, and Prospect Streets in the city of Boston, entered it for the purpose of examining it, and went up a flight of stairs leading from Staniford Street, but, finding the building filled with workmen and in confusion, went no farther, and made no further examination of it; and that at that time the wall of the building facing Staniford Street was up and finished, with the exception of the interior thereof. A witness for the plaintiff testified that the structure looked from the outside like one solid building, and that there was, in his opinion, no way to designate that it constituted two buildings. Later, the plaintiffs called upon the agent of the defendant, and on October 10, 1887, the defendant leased to the plaintiffs for the term of three years "all the brick building recently erected by me on the northerly corner of Staniford, Prospect, and South Margin Streets in the said Boston, with the exception of the

stores on the first floor of the said building together with the cellar under and belonging to the same."

The plaintiffs never entered the structure prior to the execution of the lease, except as above described, and the defendant never pointed out the structure to the plaintiffs, or showed them what parts of it they were to occupy under the terms of the lease. The plaintiffs took possession of the premises in the early part of November, 1887, and occupied that part of the structure over the stores facing South Margin Street, containing about eighteen rooms, during the term of the lease, paying without objection the full rent thereunder, but were never given possession or occupancy of any other part of the structure.

It further appeared by uncontradicted evidence that the structure had been made out of three small original buildings, two of which faced South Margin Street, and one of which faced Prospect Street; that at the time of the alterations the two buildings facing South Margin Street were converted into one by the removal of the partition wall between the same, and that the third building, facing Prospect Street, was separated from the others by a solid brick partition wall, which extended from the cellar to a foot or more above the roof, with no door, passageway, or other opening through it, and that, with the exception of extensions and elevations, it was substantially the same wall as divided the original buildings facing South Margin Street from the third building, facing Prospect Street; that that part of the structure on the South Margin Street side of the brick partition wall contained eighteen rooms, while that part of the structure on the other side thereof contained three flats or suites of four rooms each, each flat or suite being adapted for family house-keeping; that during the occupancy by the plaintiffs of the premises on South Margin Street the premises in controversy were occupied by other persons without objection by the plaintiffs; and that the plaintiffs never, until shortly before the termination of their tenancy, made any complaint of not having had all that they leased.

The defendant introduced evidence tending to show that the said structure was divided by a solid brick partition wall as above stated; that on Prospect Street the rear of the corner building occupied by the plaintiffs was carried straight up, while the

neighboring building claimed by the plaintiffs was lower and had a French roof, which plainly distinguished it from the other on Prospect Street ; that Staniford Street at the time of the execution of the lease had recently been extended, and that there were no numbers for the street at that time, so that the description of the corner building, which as altered fronted on Staniford Street, could not be made by numbers ; that the corner building was originally designed by the defendant for three flats, but that, at the request of the plaintiffs prior to the execution of the lease, it was changed into lodgings, and that iron kitchen sinks in certain of the rooms were then removed ; and that there were two stores below the corner building. The defendant further introduced evidence tending to show that the plaintiff Durr had a conversation with his agent, in which she asked what the cost would be of the neighboring building, and was told that it would be five to six hundred dollars extra, and was advised to take the corner building, and see how she got on there, and then arrange about the other later ; and that at the date of the execution of the lease, and of the visit of the plaintiffs to the premises, the walls and partition of the two buildings were up, some of the floors were laid, stairs were in place, and both buildings were well along toward completion. This was denied by the plaintiff Durr. It did not appear affirmatively, other than by the foregoing evidence, whether the plaintiffs knew of any partition wall before the execution of the lease, or that the wall or roof facing Prospect Street was different in appearance from that facing Staniford Street.

At the trial, the plaintiffs offered to show that, prior to the execution of the lease, they informed the agent of the defendant for what purpose they proposed to use the premises. The offer was excluded ; and the plaintiffs excepted.

The plaintiffs also offered to show, by the testimony of the plaintiff Durr, who had not qualified as an expert, what would be a fair average rental value of the twelve small rooms in that part of the building not occupied by them, if the plaintiffs had furnished them and occupied them for a lodging house, and also what the twelve rooms which were not occupied by them would have been worth to them for the purpose of a lodging house if they had paid no larger rent. The offer was excluded ; and the plaintiffs excepted.

The plaintiffs requested the judge to rule as follows: 1. The construction of every written instrument is a matter of law for the Court. 2. In the construction of the lease, the word "building" means structure, and applies to and includes all that structure erected by the defendant just prior to the date of the lease "on the northerly corner of Staniford, Prospect, and South Margin Streets in said Boston" under one roof. 3. In the construction of this lease the word "building" can be so construed as to include one or more tenements in the same structure, although the different tenements in the same structure may be separated and divided from the other parts by a partition wall. 4. In the construction of the lease, the words "all the brick building recently erected by me on the northerly corner of Staniford, Prospect, and South Margin Streets in the said Boston, with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same," refer to the entire structure owned by the defendant and recently erected by him on that corner, without regard to the manner in which it was partitioned or divided. 5. A lease of "all the brick building recently erected by me, with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same," means the entire structure which had been recently erected by the defendant, except such portions of the same as were specifically excepted from the operation of the lease. 6. The lease is a contract between the parties, and if it has never been cancelled or modified the court must construe it, and parol evidence is not admissible to show any other or different contract than the one executed by the parties. 7. The fact that the plaintiffs hired this building for a special purpose may be proved by oral evidence, and need not be stated in the lease. If the court finds this property was hired by the plaintiffs for a lodging house, and so stated to the defendant, or his agent, before the execution of the lease, the measure of damages is the amount of loss the plaintiffs suffered in their business by reason of the acts of the defendant in keeping them out of any portion of the premises included in the lease. 8. Parol evidence of the practical construction given to a lease by the subsequent acts of the parties thereto is not admissible unless the language thereof in the description of the property leased is doubtful.

The judge gave the first, sixth, and eighth rulings as requested, but refused to give the others; found that there was a latent ambiguity in the lease, and admitted evidence to explain what premises were covered by the same; found as a matter of fact that the lease did not include the building in controversy; and found for the defendant. The plaintiffs alleged exceptions.

M. R. Thomas, for the plaintiffs.

H. W. Chaplin, (*W. F. Dana* with him,) for the defendant.

FIELD, C. J. This case was tried by the court without a jury. By the lease, the defendant let to the plaintiffs "all the brick building recently erected by me on the northerly corner of Staniford, Prospect, and South Margin Streets in the said Boston, with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same," etc. The question at the trial was what building was covered by the lease. In applying the lease to the land, oral evidence was competent to show where, at the time of the execution of the lease, the streets were, and what building there was on the corner of these streets then recently erected by the defendant. Construing the lease with reference to the undisputed facts, we doubt whether any real ambiguity appears; but if there is any ambiguity, it is a latent, and not a patent ambiguity. The exceptions recite that the corner building, which had been originally two buildings and had been converted into one by removing the partition wall, "was originally designed by the defendant for three flats, but that, at the request of the plaintiffs prior to the execution of the lease, it was changed over into lodgings," etc. The adjoining building on Prospect Street was separated from the corner building by a solid brick partition wall, extending from the cellar to a foot or more above the roof, and contained, above the store on the first floor, three flats or suites of four rooms each, adapted for housekeeping. This partition wall between the two buildings had no openings of any kind from one building into the other.

The first exception is to the exclusion of evidence offered by the plaintiffs that "they informed the agent of the defendant for what purpose they proposed to use the premises." If this evidence was offered for any other purpose than to affect the damages, we do not see the pertinency of it. Certainly it does

not appear that the plaintiffs have been harmed by the exclusion of it.

The second and third exceptions relate to damages, and the witness was not qualified to testify on the subject.

Of the requests made at the close of the testimony, the first, sixth, and eighth were given. The seventh request relates to damages. The remaining requests relate to the meaning of the description of the premises in the lease as applied to the building and land, and could not be given as pure matters of law, independently of any evidence relating to the building on the corner of the streets mentioned.

The finding of fact by the court, that "the lease did not include the building in controversy," was warranted, if not required, by the undisputed facts. *Exceptions overruled.*

WILLIAM HENRY KING'S CASE.

Suffolk. January 12, 1894. — March 5, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Habeas Corpus — Petition by Stranger — Bringing question before full Court.

Where a person imprisoned, who is a minor or a person of unsound mind, is brought before the court on a writ of habeas corpus issued in his behalf on the petition of a stranger who shows no interest in the controversy, a next friend or guardian *ad litem* may be appointed by the court, and after such appointment the petitioner cannot control the proceedings, and has no right to appeal from the decision of the court.

As there are no longer any terms in the Supreme Judicial Court, all proceedings on habeas corpus before a single justice may now be regarded as before a court held by a single justice, and questions of law may be reserved or reported to the full court as in other proceedings before the court held by a single justice.

FIELD, C. J. Mrs. E. A. Webster Ross presented her petition to the Supreme Judicial Court in behalf of William Henry King, praying that said King might be discharged from confinement in the McLean Asylum in Somerville, to which he had been committed as an insane person. A writ of habeas corpus was issued by the court, and King brought before the court. A guardian *ad litem* was appointed for King, and the guar-

dian made a report to the court; a hearing was had, and a decree entered remanding King to the custody of the Asylum, and a petition by the original petitioner for a rehearing was denied. The petitioner appealed. She also filed exceptions, which were disallowed.

It does not appear from the papers that the petitioner is a relation of King, or has any interest, direct or contingent, in his property, or has any authority from him, if he could give any authority, to appear in his behalf. The Pub. Sts. c. 185, § 4, provide as follows: "Application for the writ [of habeas corpus] shall be made to the court or magistrate authorized to issue the same by complaint in writing, signed by the party for whose relief it is intended, or by some person in his behalf," etc. It is often necessary that the court or magistrate should receive a petition signed by some other person in behalf of the person imprisoned, because the person imprisoned may be prevented by his imprisonment from signing such an application. But when the person imprisoned is brought before the court or magistrate, and he is a person of full age and of sound mind, he then has control of the proceedings in his behalf. If the person imprisoned is a minor, or if there is reason to believe that he is not of sound mind, a next friend or guardian *ad litem* may be appointed by the court. After a next friend or guardian *ad litem* has been thus appointed, a stranger who shows no interest in the controversy cannot control the proceedings, and has no right to appeal from the decision of the court. The appeal in the present case therefore must be dismissed, even if an appeal by a proper party would lie. See *Lawless v. Reagan*, 128 Mass. 592.

There is perhaps some uncertainty about the practice of bringing questions of law before the full court in proceedings on habeas corpus. By Pub. Sts. c. 185, § 3, the writ may be issued by either of the courts named in that section, or by a judge of either of the courts, or in certain cases by a justice of the peace; and by § 5 the writ may be made returnable forthwith before the Supreme Judicial Court, or before some justice thereof, in term time or vacation, whether the court is in session or not. By § 7, when the writ is issued by a court in session, "it shall be signed by the clerk, otherwise it shall be signed by the magistrate issuing the same." By § 16, "If the court to which

the writ is returnable is adjourned before the writ is returned, the return shall be made before any one of the justices of the court; and if the writ is in any case returned before a justice at a time when the court is in session, such justice may adjourn the case into the court, to be there heard and determined in like manner as if the writ had been returned into court."

These provisions were enacted when there were terms of court, and when a court of common law could not hear causes in vacation. They were enacted that there might be a speedy hearing, whether the court was in session or not. Habeas corpus proceedings are regarded as proceedings at common law. In *Wyeth v. Richardson*, 10 Gray, 240, it was decided that exceptions do not lie to the discharge of a prisoner on habeas corpus by a single judge. In this case it seems to have been considered that the single judge did not sit as a court, but as a magistrate, and this is implied in the opinion. It is there said, "There is no appellate power over such decisions made at chambers by a justice of this court."

Section 21 of Pub. Sts. c. 185, provides that, "Until judgment is given, the court or judge may remand the party, or may bail him to appear from day to day, or may commit him to the sheriff of the county, or may place him under such other care and custody as the circumstances of the case may require."

If the hearing on habeas corpus is had before the court held by a single justice, a reservation of questions of law arising therein would, it seems, be authorized by Pub. Sts. c. 150, § 8, and a report "after verdict or decision by the court" would, it seems, be authorized by Pub. Sts. c. 153, § 6. The provisions in the Public Statutes concerning the writ of habeas corpus which we have cited were taken from Gen. Sts. c. 144, §§ 3, 5, 16, and 24, and these substantially were taken from the Rev. Sts. c. 111, §§ 3, 4, 6, 7, 8, 9, and 18; and these again were taken from St. 1784, c. 72. The provision for adjourning the case into court was taken substantially from the fourth section of St. 1784, c. 72. See St. 1808, c. 80. When St. 1784, c. 72, was passed, the Supreme Judicial Court was composed of a chief justice and four other justices, and any three of them were authorized to hold a court, but the court could not be held by a single justice. This was also the law during the Provincial

period. Any one of the justices of the Supreme Judicial Court was first authorized to hold a court by St. 1804, c. 105, § 3, and by § 5 exceptions were therein allowed to any opinion, direction, or judgment of the justice, to be heard by the court when held by three or more justices. The court held by three or more justices had, however, cognizance of all matters and things whatever which were within the jurisdiction of the court. Under the Revised Statutes the jurisdiction of the court when held by three or more justices, or held by any one of the justices, was defined by c. 81, §§ 11, 12, 13, *et seq.* All issues of law were to be heard and determined exclusively in the full court, and questions of law arising in any proceedings had before a court held by a single justice might be reserved for the consideration of the full court, or exceptions might be taken to any ruling of the justice (§§ 29, 30); but these statutes did not prohibit the full court from trying any questions of fact as well as of law in such proceedings as habeas corpus. The old cases show that writs of habeas corpus were often made returnable before a court held by three or more justices, and were tried by such court. *Commonwealth v. Harrison*, 11 Mass. 63. *Commonwealth v. Cushing*, 11 Mass. 67. *Commonwealth v. Chandler*, 11 Mass. 83. *Jones v. Kelly*, 17 Mass. 116. *Ross's case*, 2 Pick. 165. *Riley's case*, 2 Pick. 172. *Commonwealth v. Waite*, 2 Pick. 445. *Commonwealth v. Brickett*, 8 Pick. 138. *Commonwealth v. Whitney*, 10 Pick. 434. *Commonwealth v. Downes*, 24 Pick. 227. *Burnham v. Morrissey*, 14 Gray, 226.

Sanborn v. Carleton, 15 Gray, 399, was actually heard by Chief Justice Shaw in vacation. This case is more fully reported in 23 Law Rep. 8. See 22 Law Rep. 730. It appears by the report that the other justices were called in to aid and assist the Chief Justice. Exceptions were allowed by the Chief Justice, but we are not aware that they were ever considered. The allowance of exceptions in that case seems to be inconsistent with the decision in *Wyeth v. Richardson*, *ubi supra*. In both cases the prisoner was discharged.

In recent cases questions of law arising on habeas corpus have been reserved, or reported, or adjourned into the full court by a single justice. *Clarke's case*, 12 Cush. 320. *Stone v. Carter*, 13 Gray, 575. *May v. Shumway*, 16 Gray, 86. *Bryan v. Bates*,

12 Allen, 201. *Nauer v. Thomas*, 13 Allen, 572. *Kingsbury's case*, 106 Mass. 223. *Blake's case*, 106 Mass. 501. *McConologue's case*, 107 Mass. 154. *Glover's case*, 109 Mass. 340. *Mowry's case*, 112 Mass. 394. *Davis's case*, 122 Mass. 324. *Thompson's case*, 122 Mass. 423. *Sennott's case*, 146 Mass. 489. *Conlon's case*, 148 Mass. 168. *Kelley's case*, 152 Mass. 432. *Plumley's case*, 156 Mass. 236. *Kerrigan, petitioner*, 158 Mass. 220.

In *Buck v. Wolcott*, 13 Gray, 268, it was decided that, under the provisions of St. 1859, c. 196, the full court at a law term in civil proceedings at law "has no jurisdiction of matters which have not become questions of law ready for the action of the whole court." St. 1859, c. 196, §§ 36, 38, 56. Since this statute all questions of fact in civil proceedings at law must be heard and determined by a single justice, or by a court held by a single justice, and only questions of law in such proceedings can come before the full court. It follows that since this statute, if the proceedings on habeas corpus are to be adjourned into court for the determination of facts as well as law, they must be adjourned into a court held by a single justice, but if they are to be adjourned into court for the determination of questions of law alone, they should be adjourned into the full court. As there are no longer any terms in the Supreme Judicial Court, all proceedings on habeas corpus before a single justice may now be regarded as before a court held by a single justice; and questions of law may be reserved or reported to the full court, as in other proceedings before the court held by a single justice. St. 1885, c. 384. Whether they shall be reserved, or reported, or adjourned into court, has, it seems, become merely a matter of phraseology.

Whether at a hearing on habeas corpus before a single justice sitting as a court exceptions can be taken to any ruling on any question of law, or an appeal can be taken from any judgment upon matters of law apparent on the record, has not been decided. The power of the justice to prevent any unnecessary imprisonment is ample, either by admitting the prisoner to bail, or by discharging him pending the exceptions, if in the opinion of the justice he is entitled to be discharged, on the ground that the exceptions are frivolous, immaterial, or intended for delay. Pub. Sts. c. 150, § 20, c. 153, § 12. St. 1891, c. 362. *Commonwealth*

v. *Meserve*, 156 Mass. 61. It is unnecessary to decide in this case whether, after judgment, an appeal by a proper party would lie, because the papers before us raise no question of law. See *Cox v. Hakes*, 15 App. Cas. 506; *The Queen v. Barnardo*, [1891] 1 Q. B. 194. *Appeal dismissed.*

T. Savage, for the petitioner.

W. A. Munroe, for the guardian of King.

JAMES H. MCGUERTY vs. DAVID HALE.

Suffolk. January 17, 1894. — March 5, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Evidence — Negligence.

In an action for personal injuries occasioned to the plaintiff, a boy eighteen years old, by having his arm caught in a machine upon which he was working in the defendant's employ, the plaintiff asked a witness called as an expert the following question. "Should you consider that a boy eighteen years old, a short boy like the plaintiff here, was a proper person to put to work on such a machine as that before you?" *Held*, that the question was rightly excluded.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ at work upon a machine, the plaintiff asked A., the defendant's foreman, who was a witness for the plaintiff, concerning B., a fellow workman, "What should you call him?" The judge excluded the question, but told the plaintiff's counsel that he might inquire of the witness as to B.'s appearance, his ability and capacity to work, and his general mental capacity, so far as he observed it. *Held*, that the plaintiff had no ground of exception.

In an action for personal injuries occasioned to the plaintiff while at work upon a machine in the defendant's employ, the declaration alleged that the defendant did not use reasonable care to furnish, and did not furnish, competent fellow workmen. The defendant, in his direct examination, was allowed, against the plaintiff's objection, to answer the question whether A., his foreman, was a careful man or not. It did not appear what the answer was; but it appeared that the plaintiff, on cross-examination, asked the defendant whether A. was a fairly careful man, and the defendant answered, "I should say so." It also appeared that the plaintiff did not claim that A. was incompetent. *Held*, that the evidence that A. was a careful man was admissible, even if his competency was conceded.

A master is not bound to cover the gearing upon a machine which is in plain sight, and is not liable to an action by a servant injured thereby merely for neglecting so to do.

If a room in a factory is a suitable place for a certain machine and the work which is done upon it, the fact that the foreman of the room, on a particular occasion,

did not lower the windows and ventilate the room, as he had been instructed by his master to do when the machine was being run, does not render the master liable to an action by a servant who is injured upon the machine while affected by dizziness caused by the room not being ventilated.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his arm caught in a machine upon which he was working, the declaration alleged that the defendant neglected to furnish competent fellow workmen. The plaintiff's evidence showed that E., a fellow workman, was directed by the foreman to start the machine; that E. failed to do so, and the foreman started it and cautioned the plaintiff to look out for the end of the machine, on which were two cog-wheels; that shortly afterwards some wedges on that end became loose; and that the plaintiff, without being told to do so by the foreman, reached over to fix them, and his arm was caught in the wheels and injured. *Held*, that it did not appear that E.'s incompetency to do the work which the foreman set him to do, if he was incompetent, was in any way the cause of the plaintiff's injury.

TORT, for personal injuries occasioned to the plaintiff, a boy eighteen years old, while in the defendant's employ, by having his arm caught in a machine upon which he was working, on October 4, 1884. Writ dated October 3, 1890. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

J. M. B. Churchill, for the plaintiff.

L. W. Howes, for the defendant.

FIELD, C. J. It appears that "the plaintiff called as an expert one Robinson, and asked him this question: 'Should you consider that a boy eighteen years old, a short boy like the plaintiff here, was a proper person to put to work on such a machine as that before you?'" The court excluded the question. This was right: the question was not one for an expert to answer.

The plaintiff's counsel also asked Edwards, a witness for the plaintiff, concerning Egan, a second hand in the defendant's rubber factory, "What should you call him, Mr. Edwards?" The court excluded the question, but said to the plaintiff's counsel that he might inquire of the witness as to Egan's appearance, his ability and capacity to work, and his general mental capacity, so far as he observed it. The question was very indefinite, and the court plainly intimated its willingness to admit everything that was material concerning the competency or incompetency of Egan to do the work he was set to do.

The defendant upon his direct examination was asked by his counsel whether Edwards was a careful man or not, and against the plaintiff's objection was allowed to answer the question. It does not appear what the answer was, but it appears that the plaintiff's counsel on cross-examination pursued the inquiry, and asked the defendant whether Edwards was a fairly careful man, and the defendant answered, "I should say so." It also appears that "the plaintiff did not claim that Edwards was incompetent." One of the allegations of the plaintiff's amended declaration is that "the defendant did not use reasonable care to furnish, and did not furnish, competent fellow workmen." The evidence that Edwards was a careful man was therefore admissible under this issue. If the fact of his competency was conceded at the trial, still there was no harm in proving it, although the proof was unnecessary.

The exceptions recite that "the plaintiff offered to prove that Edwards, about six years after the accident to the plaintiff, told the defendant that the safety of the workmen required that the gearing upon the machine in question should be covered, and that it was then covered by the defendant; but this evidence was excluded." This ruling should be considered in connection with the instruction to the jury that "the defendant was not bound in law to cover it [the gearing], and could not be made liable merely for neglecting so to do." The gearing was in plain sight, as the plaintiff testified. The ruling and instruction were correct upon the facts in evidence. *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168. *Downey v. Sawyer*, 157 Mass. 418. *Sullivan v. India Manuf. Co.* 113 Mass. 396. *Gilbert v. Guild*, 144 Mass. 601. *Ciriack v. Merchants' Woolen Co.* 146 Mass. 182.

The court also instructed the jury, "that, if the dizziness of the plaintiff at the time he was injured was caused by the failure of Edwards to comply with the directions of the defendant as to ventilating the room by opening the windows, the defendant would not be liable for such failure." The plaintiff had testified that "there was a strong smell of benzine, which had the effect of making me dizzy and confused,—made my head feel very queer,"—and there was testimony that "this effect varies with different individuals and is greater in a close atmosphere." The

windows in the room were made to drop down from the top, and the testimony was conflicting whether all the windows were shut or not at the time of the accident. "The defendant testified that he instructed Edwards to ventilate the room by opening the windows when the machine was being run." If the room was a suitable place for such a machine and such work, the fact that the foreman on a particular occasion did not let the windows down and did not ventilate the room would not make the defendant liable at common law. If this was an act of negligence, it was the negligence of a fellow servant of the plaintiff. This we understand to be the meaning of the instruction, and so understood it is correct. *Zeigler v. Day*, 123 Mass. 152.

We are unable to see that Egan's incompetency to do the work which Edwards set him to do, if he was incompetent, was in any way the cause of the injury to the plaintiff. Edwards, the foreman, told Egan to go up stairs and help him get the machine ready. A part of the plaintiff's testimony recited in the exceptions is as follows: "It was Egan's place, after he got down from the top of the machine, to go around to the side where the belt was and run on the belt from the loose to the tight pulley, but he failed to do this. As Egan failed to do this, Edwards had to do it himself, and he told me to look out. Said he, 'Look out for this end of the machine,' meaning the end on which were the two cog-wheels, and as he said that he went on the opposite side and pushed on the belt from the loose to the tight pulley. A short while after the machine was started the jarring of the rolls loosened the two little wedges which held the sideboard in place on that side, and they became so loose that they were in danger of falling out. I sung out to Edwards that the wedges were loose; at the same time, and without anything being said to me, I reached over to fix them, and in so doing my wrist was caught between the large cog-wheel and the pinion. Egan in the mean time, as far as I could see, did nothing. He was standing at the back of the machine like a statue, and did n't do the first thing. This was the first time I had worked with Egan." As Edwards started the machine, it seems that Egan's failure to start it had directly nothing to do with the accident. It is to be noticed that Edwards did not tell the plaintiff to fix the wedges or to put his hands in near the cog-wheels.

Whether Edwards expected that the plaintiff would tell him if the wedges got loose, so that he could stop the machine and fasten them, or expected that the plaintiff would undertake to fasten the wedges while the machine was in motion, is not entirely clear, but we cannot see that it was through any fault of Egan that the plaintiff was hurt. Egan's failure to start the machine cannot be considered as the proximate cause of the plaintiff's injuries.

Exceptions overruled.

I. W. NORCROSS, JR. *vs.* JOHN A. CRABTREE & another.

SAME *vs.* SAME.

SAME *vs.* SAME.

SAME *vs.* SAME.

Suffolk. January 22, 1894. — March 5, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Rule of Superior Court — General Order to Clerk — Power of Clerk to enter Judgment in Action pending Appeal.

Under the 27th Rule of the Superior Court, providing that "on the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court," and an order passed by the court and addressed to the clerk, "that judgment be entered on the first Monday of every month . . . in all actions pending in said court which are ripe for judgment," the clerk has no power to enter judgment in an action in which an appeal is pending from the disallowance of a motion to take off a default.

FIELD, C. J. The first case is a writ of *scire facias* against the bail of Arthur E. Miller and Fred Miller. The second case is a writ of *scire facias* against the bail of Arthur E. Miller. The third is the same as the first, and the fourth is the same as the second, but a different question of law is raised in the third and fourth cases from that raised in the first and second. Arthur E. Miller and Fred Miller were both arrested in a suit against them, and they gave bail, the defendants being their sureties; Arthur E. Miller was also arrested in another suit which was against him alone, and he gave bail, the defendants being his sureties. The plaintiff obtained judgment in these two suits,

and, the judgments being unsatisfied, he brought these writs of *scire facias*. The first two of the cases before us are appeals by the defendants from a judgment of the Superior Court disallowing a motion made by them that their default might be taken off, etc. The last two are appeals by the plaintiff from the judgment of the Superior Court dismissing the actions and discharging the bail. If the judgments appealed from in the last two cases are affirmed, it will be unnecessary to consider the appeals in the first two cases. In each case all the proceedings were substantially the same, and in each the bail surrendered their principal in the court where the writ of *scire facias* was pending on August 1, 1893, at ten o'clock in the forenoon, and they paid the plaintiff the costs of court up to that time. The Pub. Sts. c. 163, § 12, provide that bail may so surrender their principal "at any time before final judgment," and may be discharged, and the question of law in these cases is whether the surrender was before final judgment. The writs of *scire facias* were returnable on the first Monday of April, 1893, and, no appearance having been entered for the defendants within ten days from the return day, their default was recorded. On April 25, they filed a motion in writing that the default might be taken off, and that they might have leave to enter an appearance. On May 4, they also filed a motion that the default might be taken off, that they might be allowed to enter an appearance and file an answer in the case, and might have a reasonable time to file an affidavit of defence, if required by the court. On May 18, the motion to take off the default was disallowed, and the defendants appealed to this court, and the appeal was duly entered here. After the surrender on August 1, 1893, viz. on August 7, a motion was made that the bail be discharged, which was granted; and the plaintiff appealed to this court.

Rule 27 of the Superior Court was in force during the pendency of these suits, and is as follows: "On the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court; and the court, or any justice, may at other times order judgment to be entered in any action." The Superior Court had passed the following general order, which was also in force, viz.: "To the Clerk of the Superior Court within and for the County of Suffolk.

Ordered, that judgment be entered on the first Monday of every month, and on the next day thereafter, when said Monday is a legal holiday, in all actions pending in said court which are ripe for judgment, unless the party entitled thereto otherwise requests in writing." See St. 1885, c. 384, §§ 3, 7, 8, 10, 11, 12. When the bail surrendered their principal there had been in fact no entry of judgment by the clerk in the actions, and no order for judgment had been made by the court, or by any justice thereof.

The contention of the plaintiff is, that by force of the rule of court and of the general order the actions went to judgment on the first Monday of June, 1893. The motion to take off the default had been disallowed on May 18, and although the defendants claimed an appeal from this order, the plaintiff contends that no appeal lay, because it was in the discretion of the justice hearing the motion whether it should be allowed or disallowed, and because the order is not a judgment within the meaning of Pub. Sts. c. 152, § 10. We are not called upon to determine whether the Superior Court or any justice of that court might have ordered final judgment entered in the actions pending the appeal from the order disallowing the motion to take off the default, either on the ground that no appeal lay from such order, or on some other ground. We think that it was not the intention of the rule that the clerk should have any such power. On the face of the record there was an appeal pending which would prevent the entry of judgment. It was not for the clerk to determine whether this was a valid appeal or not. According to the record the actions were not ripe for judgment. No judgment in fact was entered, and without considering whether a judgment may be considered as entered before any record of it has been made, on the ground that under the rules the clerk ought to have entered it, we are of the opinion that on the record as it stood the clerk could not have entered judgment, and that therefore the surrender was in time.

Actions dismissed, and bail discharged.

C. H. Sprague, for the plaintiff.

E. C. Gilman, for the defendants.

ELIZABETH W. WILLARD vs. ELLA M. BRIGGS & others.

Middlesex. January 23, 1894. — March 5, 1894.

Present: FIELD, C. J., ALLEN, MORTON & BARKER, JJ.

Creditors' Bill — Husband and Wife — Premature Suit.

A wife filed a petition against her husband in the Probate Court, under Pub. Sts. c. 147, § 33, and an attachment of his property was ordered by that court, but none could be found which could be attached. Before a decree had been rendered by the Probate Court on the wife's petition, she filed a bill in equity to reach and apply certain mortgages and mortgage notes of her husband which could not be attached or taken on execution in a suit at law, and to hold them until she could obtain a decree in the Probate Court, and to then apply them in satisfaction of the decree. *Held*, that until it was decided by the Probate Court that she was living apart from her husband for justifiable cause, and was entitled to be supported by him under Pub. Sts. c. 147, § 38, and a decree entered in her behalf for a definite sum of money, there was no debt due to her from her husband, and she was not a creditor within the meaning of Pub. Sts. c. 151, § 2, cl. 11, and § 3.

A court of equity cannot decide whether a wife is living apart from her husband for justifiable cause, and is entitled to be supported by him under Pub. Sts. c. 147, § 38.

FIELD, C. J. This is a bill in equity by a wife to reach and apply certain property of her husband, which, it is alleged, cannot be attached or taken on execution in a suit at law. The wife has filed a petition against her husband in the Probate Court, under Pub. Sts. c. 147, § 33, and an attachment of his property has been ordered by that court, but no property has been found which can be attached. No decree has been rendered under this petition in favor of the wife. The bill was filed for the purpose of reaching certain mortgages and mortgage notes alleged to belong to the husband, and of holding them until the wife can obtain in the Probate Court a decree that the husband should pay her a certain sum or sums of money for her support, and then of applying these mortgages and mortgage notes in some way to the satisfaction of such a decree. It is not necessary to decide whether, if such a decree had been rendered before the bill was filed, the plaintiff could have the assistance of a court of equity in enforcing it, or whether her sole remedy would be in the Probate Court, or on appeal in this court as the Supreme

Court of Probate. Pub. Sts. c. 147, §§ 33-35. *Downs v. Flanders*, 150 Mass. 92. A court of equity cannot decide whether she is living apart from her husband for justifiable cause, and is entitled to be supported by him under Pub. Sts. c. 147, § 33. Certainly, until this is decided by the Probate Court in her favor and a decree entered in her behalf for a definite sum of money, there is no debt due to her from her husband, and she is not a creditor within the meaning of Pub. Sts. c. 151, § 2, cl. 11, or § 3. *Decree dismissing the bill affirmed.*

P. Keyes, for the plaintiff.

E. L. Smith, for the defendants.

COMMONWEALTH vs. LIZZIE SULLIVAN.

Middlesex. January 29, 1894. — March 5, 1894.

Present; FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Evidence — Exceptions.

The conviction of a witness of a crime cannot be shown to affect his credibility under Pub. Sts. c. 169, § 19, without producing the record thereof.

If the bill of exceptions in a criminal case recites that the judge instructed the jury, among other things, that they might take into consideration the fact whether the defendant had opportunity to commit the crime, "and gave full instructions on all other points of the case," the defendant shows no ground of exception to the refusal of the judge, at the close of the charge, to further instruct the jury that, if any one else had opportunity to commit the crime, that fact should be considered by the jury in the defendant's favor.

INDICTMENT for the larceny, on March 30, 1893, of a watch and ring from one Thomas Dunn.

At the trial in the Superior Court, before *Braley, J.*, one Ellen Sullivan, a witness for the government, was asked on cross-examination, "Were you ever in jail in Essex County?" The judge refused to allow the question to be answered, unless the record of a conviction of the witness should be produced. The defendant's counsel replied that he had no such record to produce. The question was thereupon excluded; and the defendant excepted.

It appeared in evidence that the crime for which the defendant was indicted was committed on the night of March 8, 1893; that the defendant was with Dunn in a house in Lowell, and sat upon his lap; that then Dunn left the house in the company of one or two persons; and that Dunn at the time was drunk, and was left, according to the testimony of one witness called by the government, with the ring upon his finger in a bar-room, and afterwards the defendant never saw him.

The judge, in charging the jury, among other things, made use of this expression, that the jury might take into consideration the fact whether the defendant had opportunity to commit said crime, and gave full instructions on all other points of the case.

At the close of the judge's charge, the defendant's counsel asked that the further instruction be given to the jury, that, if any one else had opportunity to commit said crime, that fact should be considered by the jury in her favor. The judge refused so to rule; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

P. A. Fay, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

FIELD, C. J. The first exception was not argued by the counsel for the defendant. The ruling excepted to was clearly correct. *Commonwealth v. Quin*, 5 Gray, 478.

The exceptions recite as follows: "The judge in charging the jury, among other things, made use of this expression, that the jury might take into consideration the fact whether this defendant had opportunity to commit said crime, and gave full instructions on all other points of the case. At the close of the judge's charge, the defendant's counsel asked that the further instruction be given to the jury that, if any one else had opportunity to commit said crime, that fact should be considered by the jury in her favor. The judge refused so to rule," etc. For aught that appears, full and appropriate instructions already had been given on this subject, and the presiding justice may have thought that the request was made for the purpose of having him put special emphasis upon this feature of the case at the close of the charge.

Exceptions overruled.

COMMONWEALTH vs. EDWARD BRELSFORD.

Middlesex. January 29, 1894. — March 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Intoxicating Liquors — Constitutionality of Statute — Evidence.

The provision of St. 1888, c. 219, that "any beverage containing more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, . . . shall be deemed to be intoxicating liquor within the meaning of" Pub. Sts. c. 100, is constitutional.

At the trial of a complaint for keeping and maintaining a liquor nuisance, the defendant has no ground of exception to the refusal of the judge to allow samples of beer taken from the defendant's premises to be tasted by the jury, for the purpose of determining whether it is or is not intoxicating.

Evidence that the defendant has been convicted of the offence of illegally selling intoxicating liquors, is admissible at the trial of a complaint for keeping and maintaining a liquor nuisance during a period which includes the date of such sale.

At the trial of a complaint for keeping and maintaining a liquor nuisance, a certificate by the State assayer of the result of his analysis of certain beer is admissible in evidence for the purpose of identifying the beer so analyzed as that taken from the defendant's premises.

The fact that samples of liquor were taken illegally from the defendant's premises by police officers does not render evidence that they were found by analysis to contain more than one per cent of alcohol incompetent at the trial of a complaint for keeping and maintaining a liquor nuisance.

COMPLAINT, to the Police Court of Lowell, for keeping and maintaining a certain tenement in Lowell used for the illegal sale and illegal keeping of intoxicating liquors, between May 1 and November 1, 1892. Trial in the Superior Court, on appeal, before *Braley, J.*, who allowed a bill of exceptions, in substance as follows.

The gist of the complaint, as shown in the evidence, was that the defendant kept and sold illegally a certain beverage known as "dandelion beer," containing more than one per cent of alcohol, and had violated the statute. The defendant asked the judge to rule that the St. 1888, c. 219, was unconstitutional and void; that said statute was therefore not binding; and that the defendant had violated no law of the Commonwealth, as set out in the complaint and shown in the evidence. The defendant offered to show, by samples of the beer, that it was not intoxi-

cating, and asked that the same be given to the jurors for them to taste and test as to its being or not being an intoxicating liquor; but the judge rejected the offer. The defendant also offered to prove that the samples offered in evidence were identical in every respect with beer taken by samples in October, 1892, from the defendant's premises by officers, which the government offered evidence from the State assayer and inspector of liquors tending to show were intoxicating liquors. The judge rejected the offer; and the defendant excepted.

It appeared in evidence that on August 3, 1892, the defendant was convicted in the Police Court of Lowell of illegally selling such dandelion beer; and that the offence of which the defendant was convicted was committed on July 23, 1892. The defendant objected to the introduction of any evidence by the government of any of the defendant's acts alleged in that complaint, and committed by the defendant on or about July 23, 1892; and contended that the defendant could not be twice punished constitutionally for the same offence.

The State assayer was called as a witness by the government, and allowed to testify only as an expert in chemistry to the result of his analysis of the beer taken from the premises of the defendant between May 1 and November 1, 1892. For the purpose of identifying the beer thus analyzed by the witness as the beer taken from the premises of the defendant, the government introduced in evidence certain certificates signed by the State assayer. The blank certificates had been wrapped around the bottles containing the beer to be analyzed before the same were sent to the State assayer, and the blanks had been removed therefrom and filled by him at the time of his analysis, and set forth the results of the same, showing that the beer contained more than one per cent of alcohol by volume at sixty degrees Fahrenheit. The defendant objected to the admission of these certificates, but the judge admitted them solely for the above mentioned purpose; and the defendant excepted.

It appeared in evidence that the samples were taken from the cellar in the defendant's dwelling-house, against the defendant's protest and objection, under an alleged search and seizure warrant; that no store or place of business was then kept in the dwelling-house; and that no liquors were then taken therefrom

but the samples. The defendant objected to any evidence from the State assayer as to his analysis of the samples, because they were not legally taken by the officers.

The judge overruled the objection, and allowed the assayer to testify that his analysis of the samples showed more than one per cent of alcohol when thus taken, the analysis being made about four days after the seizure.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. F. Manning, for the defendant.

F. N. Wier, District Attorney, for the Commonwealth.

FIELD, C. J. The first exception raises the question of the constitutionality of St. 1888, c. 219, so far as it enacts that "any beverage containing more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, . . . shall be deemed to be intoxicating liquor within the meaning of " Pub. Sts c. 100.

In *Commonwealth v. Anthes*, 12 Gray, 29, 32, the defendants were indicted, under St. 1855, c. 215, §§ 15, 17, for unlawfully selling intoxicating liquors; the evidence showed sales of lager beer; the statute, by its first section, provided, among other things, that lager beer should be considered intoxicating liquor within the meaning of the statute; the defendant offered to show, by the evidence of experts and those who were accustomed to use lager beer as a beverage, that it was not in fact intoxicating, but this evidence was excluded. It was held to be rightly excluded, and that the provision declaring lager beer to be intoxicating liquor within the meaning of the statute was within the constitutional power of the Legislature. This decision is applicable to the present case, and the exception must be overruled. See *Commonwealth v. Bos*, 116 Mass. 56. *State v. Guinness*, 16 R. I. 401. *State v. Gravelin*, 16 R. I. 407. *State v. Intoxicating Liquors*, 76 Iowa, 243.

The second exception must be overruled for the same reason. The issue was not whether the liquor illegally kept for sale was actually intoxicating, but whether it contained more than one per cent of alcohol. Besides, there are grave reasons against giving to a jury liquor to drink for the purpose of determining whether it is or is not intoxicating. *Commonwealth v. McShane*, 110 Mass. 502. *Commonwealth v. Hazeltine*, 108 Mass. 479.

The offence of illegally selling intoxicating liquor is distinct from the offence of maintaining a common nuisance by keeping a tenement used for the illegal sale of intoxicating liquor; and proof of the sales on which the defendant has been convicted of the first named offence may be evidence to support a complaint for maintaining such a nuisance. The third exception must be overruled. *Commonwealth v. McShane*, 110 Mass. 502. *Commonwealth v. Hazeltine*, 108 Mass. 479.

The fourth exception must be overruled. The certificates were properly admitted in evidence for the purpose of identifying the beer analyzed by the witness as that taken from the defendant's premises, and this is the only purpose for which they were admitted. *Commonwealth v. Bentley*, 97 Mass. 551. *Commonwealth v. Kendrick*, 147 Mass. 444.

It does not appear that the samples of liquor analyzed had been illegally taken from the defendant's premises by the officers; but if they had been, this fact does not render the evidence that they were found by analysis to contain more than one per cent of alcohol incompetent. This exception must be overruled. *Commonwealth v. Dana*, 2 Met. 329, 337. *Commonwealth v. Welsh*, 110 Mass. 359. *Commonwealth v. Ryan*, 157 Mass. 403. *Commonwealth v. Tibbetts*, 157 Mass. 519.

Exceptions overruled.

COMMONWEALTH vs. EDWARD T. McMANUS.

Middlesex. March 2, 1894. — March 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Illegal Keeping for Sale — Evidence of Intent to Sell.

At the trial of a complaint for unlawfully keeping intoxicating liquors with intent unlawfully to sell the same, the uncontradicted evidence for the government showed that the constable and selectmen, who were young men of the town in which the defendant's premises were situated, visited the premises, which consisted of a dwelling-house, shed, and barn, very early in the morning, with a warrant to search the premises for intoxicating liquors; that the defendant, after their denial of his request to wait a few minutes, let them into the house, remarking that "he thought the boys would give him the same chance that the

other selectmen had given him "; that they found in a small room with a sink in it three barrels containing a large number of bottles filled with lager beer, also in the same room upon tin waiters on a table several glasses discolored and smelling of whiskey, tunnels, measures, and mugs, also in a closet several flasks filled with rum, and a large quantity of empty bottles and flasks in the house and shed, besides wine glasses and a wire drainer; that in the cellarway leading from the barn to the barn cellar was a whiskey barrel, with a capacity of thirty to forty gallons, set upon blocks, and having a faucet, and containing about two gallons of whiskey; and that the defendant's family consisted of himself, his wife, and three children. *Held*, that the evidence was sufficient to warrant a verdict of guilty.

COMPLAINT, to the District Court of Central Middlesex, for unlawfully keeping intoxicating liquors with intent unlawfully to sell the same, on April 23, 1893, at Stow. Trial in the Superior Court, before *Fessenden*, J., who allowed a bill of exceptions, in substance as follows.

The witnesses for the government were the constable and three selectmen of the town of Stow, who were young men. They visited the defendant's premises, which consisted of a dwelling-house, shed, and barn, on April 23, 1893, at twenty minutes before six o'clock in the morning, with a warrant to search the premises for intoxicating liquors. They rapped at the door of the defendant's house, and he asked them if they could not wait a few minutes. They answered, No; and the defendant let them into the house. After they had entered, the defendant said to them that he thought the boys would give him the same chance that the other selectmen had given him.

They found in the house, in a small room with a sink in it, three barrels, two of which were packed nearly full, and the third partly full, of bottles filled with lager beer. One dozen bottles in the top of the third barrel had contained lager beer, and were empty, and one bottle in the top of this barrel was half full of lager beer. There were two hundred and fifteen full bottles of lager beer in the three barrels. On the table near the sink were two tin waiters, and on these waiters were seven or eight glasses, all of which were discolored as though they had been used, and two of them smelt of whiskey. The witnesses also found on the same table two small tunnels, one two-quart measure, and one smaller measure. In a closet in the same room were a lot of whiskey glasses and some beer mugs. There were twenty-three whiskey glasses in all taken from the defendant's

house. In the dining-room closet there were ten to fifteen quart flasks filled with rum. Forty-seven empty lager beer bottles, six ale bottles marked stock ale, and eighteen empty whiskey bottles and flasks, were found in the house and shed. Some of these empty bottles were found over the shed. Two wine glasses and a wire drainer, such as is used as a dish drainer, were found in the defendant's house. In the cellarway leading from the defendant's barn to his barn cellar was a whiskey barrel, with a capacity of thirty to forty gallons, which was set up on blocks. In this barrel was a faucet from which whiskey could be drawn. One of the witnesses drew a very small quantity of whiskey through the faucet. There were about two gallons of whiskey in the barrel, according to the estimate of the witnesses. The evidence was uncontradicted. It appeared that the defendant's family consisted of himself, his wife, and three children.

The defendant offered no testimony, and requested the judge to rule that, upon the evidence, the jury would not be justified in finding a verdict of guilty. The judge refused so to rule; and ruled that, upon the whole evidence, it was for the jury to determine whether the liquors were kept by the defendant with the intent charged in the complaint.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. P. Curran, for the defendant.

G. A. Sanderson, Assistant District Attorney, for the Commonwealth.

BY THE COURT. The evidence was sufficient to warrant the verdict of the jury. *Exceptions overruled.*

JOHN NEALAND vs. BOSTON AND MAINE RAILROAD.

Essex. November 9, 1893. — March 6, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Common Carrier — Warehouseman — Baggage.

A passenger over a railroad, on arriving at his destination late in the evening, left his trunk to be placed in the baggage room of the railroad station until the next day. During the night it was destroyed by a fire which originated in an accumulation of oily waste on the floor of a closet in the corner of the baggage-room. *Held*, that the storage of the trunk, which was strictly personal baggage, being free, under a regulation of the railroad company, for the first twenty-four hours after it was received, was to be considered as paid for by the payment of the passenger's fare, and that the liability of the defendant therefor was that of a warehouseman or bailee for hire, and that it was a question for the jury whether the baggage room was kept by the defendant or its servants in a reasonably safe condition for the storage of baggage.

CONTRACT, for the value of a trunk which was destroyed by fire while stored in the defendant's railroad station at Newburyport. At the trial in the Superior Court, before *Bond, J.*, there was evidence tending to show that on the evening of March 2, 1892, the plaintiff, having paid his fare, took passage on one of the defendant's trains from Boston to Newburyport, and that he carried with him on the same train as baggage, duly checked, a trunk containing personal effects only. He arrived in Newburyport at about a quarter before eight in the evening, and proceeded to Amesbury, where he resided. As the night was stormy he left his trunk in the baggage-room of the defendant's railroad station in Newburyport, intending to send for it the next day. During the night the railroad station was burned, and the plaintiff's trunk destroyed. It appeared that the fire originated in a closet in the corner of the baggage-room, in which was kept a barrel of kerosene oil, a barrel of lantern oil, some clean cotton waste, and under the barrels some oily cotton waste which had been used.

It was agreed that a notice like the following had, for some time prior to March 2, 1892, been posted in the stations of the defendant, and the plaintiff testified that he had seen it posted in the station at Salisbury Point, which was several miles from

Newburyport: "Boston & Maine R. R., notice to passengers. Storage of baggage. A charge for storage of baggage will be made on all baggage remaining unclaimed in the baggage rooms of this road more than twenty-four hours after its arrival at the station to which it is checked. For each piece of baggage, the charge will be twenty-five cents for the first twenty-four hours, or fraction thereof, after the expiration of the specified time of free storage, and ten cents for each additional twenty-four hours, or fraction thereof. The twenty-four hours of free storage will begin at midnight of the day baggage is received, and the charge for storage will begin at midnight of the following day."

This was all the material evidence in the case. The judge, at the defendant's request, ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

H. I. Bartlett, for the plaintiff.

W. I. Badger, for the defendant.

FIELD, C. J. On the undisputed facts of this case, we think that the duty of the defendant was to take such reasonable care of the plaintiff's trunk as warehousemen or bailees for hire are required to take. In those jurisdictions where it is held that the passenger has a reasonable time after his arrival at a station to call for and take away his baggage, and that during this time the carrier remains responsible for the safe keeping of baggage, according to the strict rule applicable to common carriers of passengers and baggage, it would be held, we think, that, as Newburyport was the end of the plaintiff's journey on the railroad, and as the plaintiff did not take his baggage on arrival, but left it to be placed in the defendant's baggage room for the night, the defendant's duty was that of a warehouseman. *Roth v. Buffalo & State Line Railroad*, 34 N. Y. 548. *Vineburg v. Grand Trunk Railroad*, 13 Ont. App. 93. *Chicago, Rock Island, & Pacific Railroad v. Fairclough*, 52 Ill. 106. *Bartholomew v. St. Louis, Jacksonville, & Chicago Railroad*, 53 Ill. 227. *Hæger v. Chicago, Milwaukee, & St. Paul Railway*, 63 Wis. 100. *Ouimit v. Henshaw*, 35 Vt. 605. *Burnell v. New York Central Railroad*, 45 N. Y. 184. *Louisville, Cincinnati, & Lexington Railroad v. Mahan*, 8 Bush, 184. *Mote v. Chicago & Northwestern Railroad*, 27 Iowa, 22. *Thompson on Carriers*, 534, § 23.

The decision in *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, must be taken by analogy to show that the liability of the defendant in this Commonwealth is that of a warehouseman or bailee for hire. In that case it is said in the opinion: "The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place, and all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for." In *Miller v. Mansfield*, 112 Mass. 260, it is said: "After the arrival of the goods at their destination the liability of the company as common carriers ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen." See also *Rice v. Hart*, 118 Mass. 201, and *Bassett v. Connecticut River Railroad*, 145 Mass. 129. The notice posted by the defendant concerning the storage of baggage, which the plaintiff had seen, does not change this rule. The storage for the first twenty-four hours, which is called in the notice "free storage," is to be considered as paid for by the payment of the passenger's fare.

The only remaining question in the case then is whether there was evidence for the jury that the defendant's baggage-room was not kept in a reasonably safe manner as a place or warehouse for the storage of baggage. In a corner of this room there was a closet in which was kept a barrel of kerosene oil, a barrel of lantern oil, some clean cotton waste, and under the barrels some oily cotton waste, which had been used. In this corner the fire originated. The plaintiff contends that it is common knowledge that oily cotton waste is apt to take fire of itself. Whether this is so or not, or whether there should have been evidence on this point, it is not perhaps necessary to decide. We do not think that the case was taken from the jury on account of the lack of specific evidence on this point. We think it probable that the ruling was made on the authority of *Clark v. Eastern Railroad*, 139 Mass. 423. In the opinion in that case it is assumed that the defendant was a gratuitous bailee, and was

liable, if at all, only for gross negligence, and it is said: "In this view, it is not necessary to consider the further proposition of this defendant, that, since the plaintiffs' property was put into the defendant's custody without its consent, and solely through the wrongful and fraudulent conduct of the plaintiffs themselves, all the consequences must be borne by them exclusively." The trunks in that case contained merchandise, and had been checked by a commercial traveller, who had paid only a passenger's fare. If the railroad company was liable at all on the ground of negligence for the loss of such merchandise, when carried with a passenger as personal baggage, it was liable only for gross negligence. *Blumantle v. Fitchburg Railroad*, 127 Mass. 322. In the case at bar the trunk was strictly personal baggage, and the defendant's liability is that of a warehouseman or bailee for hire. Under this rule we are of opinion that it was a question for the jury whether the baggage-room was kept by the defendant or its servants in a reasonably safe condition for the storage of baggage. See *Mote v. Chicago & Northwestern Railroad*, 27 Iowa, 22; *St. Louis & Cairo Railroad v. Hardway*, 17 Bradw. (Ill.) 321.

Exceptions sustained.

FLORA WARES, PETITIONER.

Suffolk. December 15, 1893. — March 7, 1894.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

Habeas Corpus — Commissioners of Public Institutions — Constitutional Law.

Where the Commissioners of Public Institutions of the City of Boston have, after a full and fair hearing, denied the petition of the mother of a minor child committed to their custody under the provisions of Pub. Sts. c. 48, and Sts. 1882, c. 181, and 1886, c. 330, for its restoration to her, their action, where no error in law or neglect or unfaithfulness in the discharge of their duty is alleged, will not be reviewed on a writ of habeas corpus.

Pub. Sts. c. 48, § 18, St. 1882, c. 181, and St. 1886, c. 330, are constitutional.

PETITION, filed on November 17, 1893, for a writ of habeas corpus to the Commissioners of Public Institutions of the City of Boston.

Hearing before *Lathrop, J.*, who, at the request of the petitioner, adjourned the case into the full court, and reported it to that court for its determination on an agreed statement of facts, in substance as follows.

The petitioner is the mother, surviving parent, and duly appointed guardian of *Mary Wares*, a minor, for whose custody the petition is brought. The child was committed to the custody of the Commissioners of Public Institutions of the City of Boston, by virtue of a mittimus issued by the municipal court of the city of Boston on July 7, 1891, under the provisions of the Pub. Sts. c. 48, and Sts. 1882, c. 181, and 1886, c. 330, during her minority, or until otherwise discharged by due course of law, and the child was placed by them, acting under the authority of the statutes, in a respectable family, where she now is. Prior to the filing of this petition the mother applied to the commissioners for the custody of her child, and, after a full hearing, the application was denied.

H. T. Richardson, for the petitioner.

T. M. Babson, for the commissioners.

MORTON, J. The question presented in this case is different from that which arose in *Farnham v. Pierce*, 141 Mass. 203, or *Kelley, petitioner*, 152 Mass. 432. In the former case it was whether the rights of the father, who had had no opportunity to be heard, were concluded by the findings of the district court, so that he could not be allowed to show that the object of the commitment had been accomplished. In the latter case, it was whether the mere fact, which was set up in the answer of the Board of Lunacy and Charity, that in its judgment the object of the commitment had not been accomplished, deprived the father, without his having been heard upon the matter, of the right to show that the object of the commitment had been accomplished, and that the child should be discharged. In this case the question is whether the mother, who is the surviving parent and the guardian, and whose petition has been heard by the commissioners and denied, as the report states, "after a full hearing of the petitioner and her witnesses," is entitled to have the issues of fact thus passed upon heard anew in this court, and again and again — for that must follow — as often as she shall petition the commissioners and they after a hear-

ing shall deny her suit, or whether, no error of law and no neglect or unfaithfulness on the part of the commissioners being alleged or shown, their action shall be treated as disposing of the matter, on the ground that the petition is addressed to their discretion. It is to be observed, that, though careful provision is made for an appeal from the finding of the court or magistrate before whom the child is brought in the first instance, (St. 1882, c. 181, as amended by St. 1886, c. 330,) there is no provision for an appeal from or a revision of the action of the board or officers having custody of the child, either as to arrangements made by them for its care while in their custody, or upon a petition to them for its discharge. The object of the various statutes is to promote the welfare of the child, and there are strong reasons for holding, in a case where the board having custody of the child has, after full hearing, decided in view of all the circumstances that the child should not be discharged, that such a conclusion should not be reviewable here. It might, and doubtless would, interfere seriously with the success of the boards and officers to whom such children are committed in finding places for them in respectable families, if it were understood that the decisions of the boards or officers as to whether the children should or should not be discharged from custody and restored to their parents were subject to be brought before this court whenever and as often as the parents chose. The right of the parent is to be protected, but the welfare of the child is the paramount consideration. And as between the parent on one side and the child on the other, it may be safely left to the boards and officers to whose custody courts and magistrates are authorized to commit children situated as described in the statutes to decide, after hearing the parties, whether in view of all the circumstances the object of the commitment has been accomplished, and the child should be discharged and restored to its parent. *Mendon v. County Commissioners*, 5 Allen, 13. If in any case a board, or the officers having custody of the child, unjustifiably refuse to hear the parent, or proceed in any manner unlawfully, "the rights of the parent," as it is said in *Farnham v. Pierce*, 141 Mass. 203, 206, "can be protected on habeas corpus by this court." It is to be presumed that public boards and officers will discharge faithfully and properly the duties intrusted to them.

But it is contended that this case is governed by *Farnham v. Pierce*, and *Kelley, petitioner, ubi supra*, and that according to those cases the petitioner has a right to a hearing in this court. As already pointed out, the questions in those cases were different from that presented by this. In *Farnham v. Pierce*, the child, after a summary hearing by the district court, of which the father had no notice, and for notice of which to any one there was no provision as the statutes then stood, was committed to the custody of the overseers of the poor of Taunton. The father applied by a writ of habeas corpus for the discharge of the child, on the ground that St. 1882, c. 181, § 3, under which the commitment was made, was contrary to Article 12 of the Declaration of Rights. The full court sustained the commitment, on the ground that the adjudication of the district court only went so far as to establish that the condition of the child then was such as to justify its commitment to the overseers of the poor, and remitted the case to a single justice in order that the father might show if he could that the object of the commitment had been accomplished. Manifestly the question thus presented was entirely different from that arising here, where the child was committed only after full compliance with the statutes, and after, it is to be presumed, notice to all the parties named in the statutes, and where the petition of the surviving parent for the discharge of the child has been denied after a full hearing by the Commissioners of Public Institutions of the City of Boston, in whose custody the child is, and against whom no erroneous ruling or neglect or unfaithfulness in the discharge of their duties is alleged. Although in that case no question as to the effect of a refusal to discharge a child by the board or officers having custody of it, after a full hearing, was before the court, it is said in the opinion: "He [the father] can apply to the overseers of the poor to discharge the child, for the reason that the object of the commitment has been accomplished, and, on showing his ability and fitness to take charge of the child, she should be discharged by them. The statute leaves that in their discretion, it is true, and, as to matters other than the right of the parent, their discretion may be absolute." (p. 206.)

In the case of *Kelley, petitioner*, 152 Mass. 432, the Board of Lunacy and Charity refused to hear the father on the question

whether the object of the commitment had been accomplished and the child should be discharged. The board alleged in its answer that in its judgment the object of the commitment had not been accomplished, and took the ground that that without anything more was conclusive. A majority of the court was of opinion that the father was entitled to be heard, and, the board having refused to hear him, the case was sent to a single justice of this court for hearing. The question whether the father would have been entitled to a hearing in this court if he had been heard fully by the board was not involved in the case, and was not considered, though it was said that, if the petition was defective in not alleging that he had offered to show to the board facts that were sufficient to show that the object of the commitment had been accomplished, the defect was supplied by the answer of the defendants.

In each of these cases the right of the parent to be heard was properly deemed, on the facts presented, to turn on the question whether the adjudication of the district court had operated as a forfeiture of the parent's rights during the time for which the child was committed, and that was the question principally discussed. And it was held in both cases — in the former by the full court and in the latter by a majority — that the adjudication did not forfeit his rights as parent. But it may well be that, though his rights as parent are not forfeited by the adjudication, he should be concluded by the decision of the board or officers having custody of his child, and having the power of discharge, if after a full and fair hearing it is decided that the object of the commitment has not been accomplished, and the child ought not to be discharged. His rights as parent are protected, first, by the presumption that the board or officers having custody of the child will do their duty faithfully and without interest or bias, and, secondly, by the liberty which he has to apply to this court by habeas corpus for the discharge of the child in case his rights are prejudiced by errors in law or wrongful conduct on their part.

We discover nothing unconstitutional in the statutes relating to this matter. Especial care is taken to see that the child should not be improperly committed. Notice of the hearing is to be given to the father, if living and resident in the State, if

not then to the mother, and if she is not then to the legal guardian if there is one, and if not then to the person with whom the child resides, and if there is no such person a guardian *ad litem* is to be appointed, and notice is to be given to the State Board of Lunacy and Charity. The child and all these persons are given a right of appeal to the Superior Court from the decisions of the court or magistrate before whom the child is brought. The rights of the parent and of the child are thus fully protected. The discretionary power given to the board or officers to whose custody the child may be committed, to discharge it before the end of the term if the object of the commitment has been accomplished, is to the advantage rather than disadvantage of the parent, and we see no valid objection to bestowing it upon such board or officers. Equally important discretionary powers vested in other boards have been upheld, and similar powers exercised by the trustees of the State industrial and reform schools have never, so far as we are aware, been questioned. *Salem v. Eastern Railroad*, 98 Mass. 431. *Train v. Boston Disinfecting Co.* 144 Mass. 523. Pub. Sts. c. 89, § 45. *Petition dismissed.*

AUGUSTUS D. IASIGI *vs.* JOSEPH A. IASIGI & another,
trustees.

Suffolk. December 11, 1893. — March 9, 1894.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

Trust — Will.

A testator by the fourth article of his will left a sum of money in trust to pay the income to his wife during her life, and after her death to distribute the principal to his children. By the fifth article he established a trust for the shares of his daughters, and by article six he provided that "All moneys herein directed to be given to each of my sons A. and T. shall be held, invested, and managed by my said trustees in separate trusts, and the net income of his several share paid to each of said sons" during life, with remainder over. By a subsequent article provision was made for another son, and by article nine the residue of the property was given to trustees in trust to invest and manage the same, paying the income to all the children equally, and on a certain day, or sooner if the fund was large enough to give to each child a "sum of money amounting to not less

than \$50,000," to distribute the principal among the children. In a later article he authorized his trustees to sell the trust property. *Held*, that the share of A. in the residue, as given in article nine, was to be held for him in trust under the provisions of article six, and that he was not entitled to have it paid over to him absolutely.

BILL IN EQUITY, against Joseph A. Iasigi and Francis C. Welch, trustees under the will of Joseph Iasigi, to compel them to pay over to the plaintiff absolutely, free of trust, his share of the residue of the estate of the testator. The case was heard by *Knowlton, J.*, on the pleadings, and reserved for the consideration of the full court. The facts appear in the opinion.

J. W. Cummings & W. W. Hoover (of New York), for the plaintiff.

L. S. Dabney, for the defendants.

ALLEN, J. The testator died on May 22, 1877, leaving a widow and five daughters and five sons. The will was dated May 5, 1877.*

By article 3 of his will he left certain real estate to his wife for life, and after her death to his children.

By article 4 he left \$200,000, in trust, to pay the income to his wife during her life, and after her death the principal to his children.

By article 5 he established a trust for the shares of his daughters. Whether this trust was limited to their shares in the fund created by article 4 was a point not conceded.

By article 6, he provided that "All moneys herein directed to be given to each of my sons Augustus D. Iasigi and Thomas G. Iasigi shall be held, invested, and managed by my said trustees in separate trusts, and the net income of his several share paid to each of said sons" during life, with remainder over.

By article 7 he established a trust for "all the moneys herein directed to be paid to my son Albert William Iasigi," until he should attain the age of twenty-five years, at which time the principal was to be paid to him. Power of disposition by will was also given to this son, after attaining the age of twenty-one years.

* The material provisions of the will may be found in full in the report of the case of *Parker v. Iasigi*, 138 Mass. 416.

By article 9 all the rest and residue of the property was given to trustees in trust, to invest and manage the same, paying the income to all the children equally; and on January 1, 1880, "or sooner, if such distribution will give to each of my children a sum of money amounting to not less than fifty thousand dollars, they shall pay over and distribute the principal of said last mentioned trust fund to and among my children who shall then be living, and the issue, if any, of any deceased child or children, by right of representation."

By article 10, he made provision for an advancement of \$25,000 to each of his other two sons, "and the sums so advanced shall in the final division of my estate be deducted from the shares of said" two sons, with interest.

By article 11, the trustees were authorized to sell all or any part of the trust property, and any other property which they might acquire as trustees.

The question now presented is, whether the plaintiff's share in the residue, as given in article 9, is to be held in trust for him under the provisions of article 6, or whether he is entitled to have the same paid over to him.

When this will was heretofore under the consideration of the court, upon the question whether the shares of the daughters and of the present plaintiff in the real estate devised in article 3, after the death of the testator's wife, were to be held in trust for them, it was determined that they were not to be so held in trust. *Parker v. Iasigi*, 138 Mass. 416. The question now presented was not then directly before the court for decision, but the court was led into an examination of the whole will for the purpose of getting at the intention of the testator in the disposition of his property, and in rendering the judgment it was said: "It appears by the latter portion of the ninth article that the testator contemplated that the final distribution of this residue should be made in money, and ample authority was given in the eleventh article to convert it into money. The gifts in the fourth and ninth articles would naturally be referred to as moneys." (pp. 422, 423.) Upon a re-examination of the will, in the light of the further and elaborate arguments which have now been addressed to us, this still seems to us to be the correct view to take of the will; and the direction in article 6,

that "all moneys herein directed to be given," etc., includes the moneys to which the two sons therein named would be entitled under article 9, upon the final distribution therein provided for. In this respect, although there are slight variations in the phraseology of the different articles, these sons and the daughters were put substantially on the same footing, and the shares of all of them in the residue were intended to be kept in trust. The gift of the residue does not stand on the same ground as the gift of the real estate in the third article. The real estate was not to be sold without the wish of the testator's wife. But it was contemplated that the residue should be converted into money or its equivalent, before distribution. This makes a distinction between the destination of the real estate and of the residue.

It is contended on the part of the plaintiff, that, if the testator had intended that the shares of these sons and of the daughters in the residue should go into these separate trusts for their respective benefits, he would have provided that they should do so at once upon his death, and he would not have directed that the property should be held together in trust for a period of less than three years. We are not informed what kind of property the residue consisted of at the time of the testator's death. It would seem, however, that he thought it would be more beneficial to his estate not to require it to be closed up, and the residue divided and distributed, until it could be substantially converted into money or its equivalent.

It is further contended that the trustees' power to sell under the eleventh article was merely for the purpose of reinvestment, and not for the purpose of distribution. This position we deem untenable. As soon as the distribution of the residue would give to each child a sum of money amounting to not less than fifty thousand dollars, the trustees were to pay over and distribute the principal. This, coupled with the power of sale given in the eleventh article, contemplates the conversion of the residue into money, or such securities as are regarded as a substitute for and equivalent of money, such as mortgage notes, government, state, and municipal stocks or bonds, etc., before making the distribution.

It is further contended that the words in the ninth article,

"a sum of money amounting to not less than fifty thousand dollars," are used rather as a measure of value than as a direction to pay over money. If so, it goes to show that the use of the term "moneys" in the sixth article is equally broad, and that it there means all such moneys as under the ninth article are to be paid over to them; that is, moneys or the equivalent of moneys.

It is further contended, that the meaning of the sixth article is best understood by referring it to article 4, under which these two sons named in article 6, in common with all the rest of the testator's children, would be entitled after the death of the testator's wife to the \$200,000 in remainder. But article 6 is not limited to what precedes. It is a general direction, applicable to all moneys which are given to these two sons by the will. The words "all moneys herein directed" mean both hereinbefore and hereinafter directed.

It is further contended that upon the above construction the words at the end of the fourth article are unnecessary, — "holding, nevertheless, in trust such distributive shares of my estate as are herein directed to be so held," — and that, being inserted, the trust created by the sixth article more naturally is to be treated as referring to and limited by the bequest in the fourth article; and that the omission of any such words at the end of article 9 confirms this view. This argument is not without force. It is to be observed, however, that when article 4 was written no trust had been declared in any earlier portion of the will, and this clause would serve to indicate, at that stage of reading the will, that the shares of certain of the children in the fund of \$200,000 were still to be held in trust. In article 9 no such provision was necessary, as the testator had then declared the trusts which in different articles applied to eight of his children.

If the plaintiff's construction of the will were to be adopted, it would follow that Albert William, who was a minor at the date of the will, and who therefore could not have been twenty-five at the latest period fixed for the final distribution of the residue, viz. January 1, 1880, would get his share of the residue before reaching the age of twenty-five. But in the seventh article, which deals with the share going to him, the testator

apparently in all parts of it, as certainly in the last part of it, was referring to all that would be going to him under article 9 as well as under article 4; and he intended that no part of the principal should be paid to the said son until he should attain the age of twenty-five years.

On the whole, we have come to the conclusion that the testator intended that the plaintiff's share of the residue should be held in trust.

Bill dismissed.

INTERNATIONAL TRUST COMPANY *vs.* JOSEPH S. WILSON.

Suffolk. November 16, 1893. — March 13, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Verdict ordered by Judge — Authority of Partner — Fraud — Notice.

Where a jury have returned findings upon questions submitted, but have separated without agreeing on a verdict, the presiding justice may nevertheless order a verdict if upon the findings and the whole evidence either party has a clear right in law to a verdict.

If by a private agreement the authority of one partner to borrow money for a firm is limited to loans on notes payable to and indorsed by the other partner, and a bank has discounted such notes for the firm, the form of the notes is material but not conclusive evidence upon the question whether the bank should be charged with notice of the limitation of authority in a suit brought by it on a subsequent note made payable to the bank and secured by collaterals.

If the president of a bank has noticed indications in the bank account of a firm that the firm was not prosperous, and had seen one member of the firm, who carried on its business in Boston, the worse for liquor, and knew that the other member of the firm resided in another city and paid but little attention to the business of the firm, these are suspicious circumstances, but consistent with good faith in taking a note of the firm for value before maturity, and are not enough to justify charging the bank with notice of any infirmity or taint in the transaction.

CONTRACT, on three promissory notes, and for money had and received. The first two notes, dated April 3 and April 30, 1891, were for \$750 and \$500 respectively, drawn by Wilson, Cassells, and Company to the order of the defendant, and by him indorsed. The third note, dated July 16, 1891, was for \$500, drawn in the same manner as the first two, payable to the plaintiff, and secured

by collaterals. The items of the count for money had and received corresponded in dates and amounts with the three notes above described.

At the trial in the Superior Court, before *Richardson, J.*, there was evidence tending to show that in June, 1887, the defendant with Wilfred E. Cassells and W. J. Hareson formed a limited partnership under the firm name of Wilson, Cassells, and Company, to continue for three years; that, except for the withdrawal of Hareson, this partnership continued throughout its term, and that at its close, though there was no renewal of the partnership articles, the partnership between the defendant and Cassells was not formally dissolved, but continued, for the purpose of closing up some contracts which they had on hand, until about August 1, 1891, when it was brought to an end by the death of Cassells.

John M. Graham, a witness for the plaintiff, testified that he was president of the plaintiff corporation; that at one time he had lived in Fitchburg, and knew the defendant, who also resided there, and knew that his financial standing was good; that from the time the partnership was formed until after the death of Cassells he had never spoken with the defendant; that all he knew of the partnership he learned from Cassells, with whom he had all the transactions hereinafter stated; that about July 31, 1889, Cassells came to the plaintiff corporation and opened an account in the name of Wilson, Cassells, and Company; that the first deposit was the proceeds of a note for \$500, signed by Wilson, Cassells, and Company, payable to the order of the defendant, and bearing his indorsement; that the witness, prior to discounting the note, had looked up the defendant's credit in some mercantile agencies, and found it satisfactory; that from time to time thereafter he continued, at the request of Cassells, to discount notes, made in the same form, signed by Wilson, Cassells, and Company, payable to the order of the defendant, and bearing what purported to be his indorsement; that during this time he discounted twenty-six or more notes made in precisely the same form; that he discounted no notes signed by Wilson, Cassells, and Company made in any other form than the first one discounted, except upon two occasions, to wit, June 27 and July 16, 1891; that on the first occasion the note was a collateral note in form like the third

one in suit, signed by Wilson, Cassells, and Company for \$250 on ten days, having as collateral thereto the notes of customers of the firm to the extent of about \$500, and on the second occasion the note was the third note in suit, which had as collateral customers' notes to the amount of \$1975. On cross-examination the witness testified that he knew that the defendant took no part in the active management of the business; that he was engaged in business in Fitchburg and came to Boston infrequently; that the firm checks were all drawn by Cassells, and that it would be possible for him, immediately upon the entering of the proceeds to the credit of the firm, to draw them out upon checks in the firm name, and to apply them to his private and personal uses, in fraud of his partner.

It further appeared, that during the last months before Cassells's death nearly all the checks that had been drawn were "cash" checks, so called, payable to the order of no particular person, and the funds were for the most part drawn out on such checks by Cassells personally, or by the bookkeeper for him. On cross-examination, Graham further testified that at any time he could have looked over the checks drawn by the firm, and if he had seen that most of them were "cash" checks it would have been significant to him, but he did not remember having looked them over, though there were things about the account that attracted his attention, regarding which he frequently spoke to Cassells.

A transcript of the deposit pass-book of the firm of Wilson, Cassells, and Company was introduced in evidence, from which it appeared that during the months of May, June, and July, 1891, seventeen deposits were credited to the firm, of which only eight were deposits of funds of the firm in the regular course of business, and these were generally of small amounts, while all the others were discounts of notes like those in suit, none of which, the defendant testified, were indorsed, authorized, or known of by him.

Graham further testified on cross-examination that the account of the firm had been called to his attention, and that he had had several interviews with Cassells about it, and had noticed unusual facts regarding it which indicated to his mind that the firm was not doing a flourishing business and the account was not a desir-

able one, and that he had so notified Cassells; that he had seen Cassells on different occasions the worse for liquor, and that he had thought of writing to Wilson about Cassells, and that if he had written he would have called Wilson's attention to the bank account; that he knew that Wilson was in business in Fitchburg and was paying little attention to the business here, and was practically at the mercy of Cassells if he was disposed to defraud him; that he had told Cassells on different occasions several months before his death that he could not discount for him to the extent that he had been doing, and that the line of discount must be reduced; and that he did this on account of the things he had noticed, and which had attracted his attention to the account. He testified that the first two notes in suit were not an unusual form of business paper, that this form of note was frequently used in order that the note might be "two name" paper, and that the holder might thus be able to hold the firm property and that of the partner indorsing it, but that he did not at any time request the notes to be made in that form, and that he did not rely at all upon the name of J. S. Wilson as an indorser, but relied wholly upon the fact that he was a general partner of the firm of Wilson, Cassells, and Company, to which firm he was making the loan; that if a partner desired to borrow money for himself individually for the purpose of lending or advancing it to the firm of which he was a member, a form of note like the first in suit would be the usual and proper form to use, and that it indicated that the loan applied for was made to the individual partner, and by him advanced to the firm, and that he should have so construed it if an agent or clerk of the partner indorsing the paper, or any other person than the partner not indorsing, presented the paper for discount, but that it was an equally usual and ordinary form of note for one partner to have discounted for the benefit and use of the firm, the two names being used in such cases to make the note a stronger one.

The defendant testified that he lived in Fitchburg, and that in 1887 he formed the partnership with Cassells and Hareson for the purpose of carrying on the business of dealing in safes; that he never gave the business any personal supervision, but came to Boston once a month on an average, and at such times usually called at the store; that the only book he looked at was the note-

book, or book showing the notes issued or discounted by the firm; that none of the notes in suit appeared on the note-book, and that several of the notes testified to by Graham did not appear on the note-book, while all the notes that he indorsed for the partnership did so appear; that he never knew of or authorized any loans to the partnership except those made upon notes appearing in the note-book signed by Cassells in the partnership name payable to his order; that, beginning with August 1, 1889, he had indorsed fifteen notes payable to his own order, signed by Wilson, Cassells, and Company; that there was an agreement between him and Cassells that no money should be borrowed for the firm except upon notes in this form bearing his indorsement; that he gave the notes he indorsed to Cassells and authorized him to raise money on them, and to put it into the firm; that the last note on which he was such indorser matured on May 2, 1891, and was for \$500, and was paid by him; that at no one time was he on such paper to the amount of more than \$1800; that he never indorsed or knew in any way of the notes in suit until they were called to his attention in the latter part of July, 1891, when he came to Boston and saw on the desk in the place of business of Wilson, Cassells, and Company notices of three notes that were presently to come due at the banking-house of the plaintiff; that he went immediately to the banking-house and asked the secretary, Jewett, how Wilson, Cassells, and Company stood with that company; that Jewett replied there was a small balance of a few dollars due them, and in reply to his request for an explanation of the notices of these notes said that the company had \$3,500 in notes signed by Wilson, Cassells, and Company, all of them, except the note third in suit, payable to the order of Joseph S. Wilson, and purporting to be indorsed by the defendant; that the notes were shown to him by Jewett; that he immediately declared the indorsements forgeries, and started to take measures to secure the arrest of Cassells, when he learned that he had shot himself in Portland, Maine; that on the same day or the next day he called on Graham regarding the notes, and during the conversation Graham told him that he had thought for some time that Cassells was going wrong, and that he (Graham) had started to write to the defendant about it, but, supposing that Cassells was a nephew or some relative of the defendant, had neglected to do so.

The defendant requested the judge to rule: 1. Upon all the evidence in the case, the plaintiff cannot recover under any count in its declaration. 2. One partner has no power or right, from being a partner, to sign the individual name of another partner; and if Cassells, without express authority from the defendant, indorsed the name of J. S. Wilson upon the back of the notes in suit, he was thereby guilty of forgery, and his action did not bind the defendant in any respect. 3. The form of the notes used in all transactions with the plaintiff was notice to the plaintiff that Cassells had no authority to borrow money in behalf of the partnership, except upon paper made payable to the order of the defendant, and bearing his valid and genuine indorsement thereon. 4. The form of the notes in suit, as well as of those previously used in all transactions with the plaintiff, was notice to the plaintiff that the loans made were not loans to the partnership, but to Wilson individually, and that Cassells was assuming to act in the matter as Wilson's agent, and not in the exercise of his general authority as a partner; and, the plaintiff having had this notice, the burden is upon it to prove by a fair preponderance of the evidence that Cassells actually had authority from the defendant to act as his agent in securing the loans, and such authority is not to be implied from the fact that he was a partner of the defendant, but must be shown independently of that fact. 5. To enable an indorsee to recover on a count for money had and received of the maker of a note he must show a complete legal title by indorsement, and unless he can do so the presumption does not arise that the party liable on the notes holds a sum of money to the use of the party entitled to it, on which the law raises an implied promise to support the action. 6. The form of the notes in suit gave notice to the plaintiff that the notes were the individual property of the defendant, and did not belong to the partnership, and that Cassells was dealing with them as agent for the defendant in his individual affairs, and not as agent of the partnership. There being no evidence of agency on the part of Cassells to secure the loan to the defendant individually, the plaintiff cannot recover. 7. If the indorsement J. S. Wilson appearing upon the back of two notes in suit was not written by the defendant or some person expressly authorized by him so to do, the plaintiff cannot recover upon the two notes, or either of

them. 8. The general rule of law is, that one partner may bind his copartners to pay money lent to the partnership by a person dealing in good faith, but if the person making the loan has notice or reasonable ground to apprehend that the partner with whom he is dealing is abusing the confidence of or defrauding the others, the other partners are not bound to repay the loan, although it was made to the partnership and the proceeds went to its benefit. 9. There being evidence that Graham had reasonable cause to believe that Cassells was abusing the confidence of his partner, it is material whether the partnership had the benefit of the proceeds of the note.

The judge declined to rule as requested in the first six requests, and instructed the jury that "I am not able to rule that the notes themselves show that this money which Cassells obtained on the discount of these notes was for Wilson individually. I do not mean to say there may not possibly be some evidence of it, — I mean I cannot rule that the form of the notes themselves indicates that."

As to the seventh request for rulings, the judge instructed the jury that it seems to be admitted that upon the first two notes the plaintiff cannot recover, for the reason that they were made to the order of J. S. Wilson, and if he did not indorse them then they were not completed notes, and the plaintiff cannot recover on them as indorsee; and it seems to be admitted that he did not indorse them, and that his signatures on them were not genuine. But if the plaintiff corporation parted with its money believing that they were genuine indorsements when they were not, it did so upon a mistake of fact, and it could recover the money back from the parties to whom it gave the money, or if it gave the money to a firm, then from the surviving members of that firm; because money paid out upon a mistake of fact, while not in one sense a fraud, is a legal deception. If the plaintiff was deceived, it can recover the money back. This applies to the first two notes.

The other note is made directly by Wilson, Cassells, and Company to the plaintiff corporation, and it is claimed that with it there were collaterals, and that these circumstances were notice to the plaintiff corporation or its president that Cassells was violating his agreement with his firm, or that something was wrong,

and so the plaintiff was put upon its guard. There is nothing in the form of this note in itself that conveys such notice. Whether the fact that this collateral was handed in to the plaintiff corporation at the same time with the note has any significance in showing to the bank officers that a fraud was intended, or that his authority was limited, is a question of fact. If there was anything in the circumstance by which they knew that Cassells was doing wrong in this transaction, and defrauding his partner, or that the president or any other officer of the corporation knew that he was getting this money to spend in fraud of his partner, the plaintiff ought not to recover.

The judge gave the eighth ruling as requested, and as to the ninth request for rulings instructed the jury: "I cannot state that exactly, because it assumes that there is evidence of that particular fact. I should say, if there is evidence that Graham had reasonable cause to believe that Cassells was abusing the confidence of his partner, then perhaps it is material whether the partnership had the benefit of the proceeds of the notes. If the plaintiff parted with its money, without notice or knowledge or having reason to know that it was being obtained by Cassells for his own private use and benefit, and in fraud of the firm, the plaintiff can recover. If, on the other hand, the plaintiff knew that Cassells's purpose was to cheat and defraud his partner, and that the money was not to be used for the firm's benefit, if the plaintiff knew that he had no right to borrow money, if it knew or had reason to know of the limit of his authority which was contained in the private copartnership agreement among the partners, and still let Cassells have the money, and although it went to the firm's credit, if that was a mere form and drawn out by Cassells immediately and used for his own special purposes, and the plaintiff knew or had reason to know of all that, then it cannot recover."

At the request of the plaintiff, the judge instructed the jury that this paper, having been made by a member of the firm and the firm name being signed to it, which was the only way that the paper of that firm could properly be signed, if the defendant undertakes to avoid liability upon the ground that Cassells acted fraudulently, and that the plaintiff knew it or had reason to know it, the burden is upon the defendant to prove that fact, as

the form of the notes does not indicate that they were either drawn for the special benefit and purpose of Wilson, or that their form disclosed any fraudulent purpose or intent.

The judge submitted two questions to the jury to find specially, as follows :

" 1. Was Cassells acting as the agent of Mr. Wilson in getting these notes discounted, and did the plaintiff know or have reason to know that Cassells was then in that matter acting as the agent of Wilson, and not as a member of, or for the firm of, Wilson, Cassells, & Co.

" 2. Did the plaintiff corporation know or have notice of the limitation of Cassells's authority in the copartnership agreement between him and Mr. Wilson in obtaining loans for the firm."

The jury retired near noon, on Friday, and were dismissed by order of the court at midnight of the same day. On the Monday following, at the coming in of the court, the jury returned in a sealed envelope negative answers to both the questions submitted, and reported a failure to agree as to the general verdict.

The judge, at the request of the plaintiff, before the jury were discharged, directed them to return a verdict for the plaintiff for the amount of the third note in suit, and of the first and second items of the count for money had and received. The defendant alleged exceptions.

S. L. Whipple, for the defendant.

R. M. Morse, for the plaintiff.

BARKER, J. 1. The defendant does not now contend that a presiding justice has no power to order a verdict if the jury have returned their findings upon questions submitted to them, but have separated without arriving at a verdict. Such a course is warranted by the doctrine that, although a jury have separated, they may be ordered to correct an incomplete and defective finding when the circumstances are such as to make it certain that justice is done by the order. *Mason v. Massa*, 122 Mass. 477, and cases cited. *Spencer v. Williams*, 160 Mass. 17. When the law applied to the findings made by the jury, and to the evidence applicable to the remaining issues, gives to one party or the other, as matter of law, a clear right to a verdict, the jury

may properly be directed to render that verdict. In such a case it is certain that justice must be done by the order, and that the rights of the parties to have disputed facts found by the jury, and the law of the trial revised by the court of last resort, are not curtailed. As held in *Roberts v. Rockbottom Co.* 7 Met. 46, 49, the presiding justice "had authority, at any time before verdict affirmed and recorded, to vary his instruction to the jury, in matter of law, and the jury were in duty bound to be governed by it."

2. If, as the defendant contends, the court had declined to permit the jury to consider the form of the notes upon the question whether the plaintiff should be charged with notice that there was an agreement between Cassells and the defendant limiting Cassells's authority to borrow money for the firm to loans on notes payable to and indorsed by the defendant, such a ruling would have been wrong. As we construe the bill of exceptions the jury were permitted to consider the form of the notes, in connection with all the evidence, but were in effect also instructed that the form of the notes was not, as matter of law, conclusive upon the question. The defendant requested the court to instruct the jury that the form of the notes "was notice to the plaintiff," and that it "gave notice to the plaintiff." This would have been in substance a ruling that the form of the notes was, as matter of law, conclusive in favor of the defendant upon the question, and would have been contrary to the authorities. The true rule was that the jury might consider the form of the notes in connection with all the other evidence in determining the question whether they should in fact charge the plaintiff with notice of a limitation of the authority of Cassells to borrow money for his firm. *Atlas National Bank v. Savery*, 127 Mass. 75, 77. *Freeman's National Bank v. Savery*, 127 Mass. 75. *Thompson v. Hale*, 6 Pick. 258. *Wait v. Thayer*, 118 Mass. 473, 478. In *National Bank of the Commonwealth v. Law*, 127 Mass. 72, the defendants' indorsement being above that of the payee's made it apparent in the light of St. 1874, c. 404, that their liability was conditional and secondary, and therefore, *prima facie* at least, for the accommodation of the maker. In that case the inference was made necessary by the effect of the statute; but the decision has no bearing in support of the defendant's contention that the

inference of notice of a limitation upon the authority of one partner to borrow money for the use of his firm should have been held a necessary inference from the form of the note in the case at bar. It is obvious that the same form might have been used if Cassells's authority had been unlimited. The case of *Cutting v. Daigneau*, 151 Mass. 297, cited upon this point by the defendant, has no bearing upon it. The note was one given to a partner by his firm, which became insolvent and was dissolved; and the note when long past due was indorsed to the plaintiff merely that the action might not be defeated by the formal objection that the payee, being one of the promisors, could not bring an action against himself, and the action failed because, the firm having failed and its creditors not having been paid, there was no surplus to divide among its members, and the plaintiff stood no better than the original payee.

In our opinion the ruling given did not withdraw the form of the notes from the consideration of the jury. The notes were in evidence, and the instruction could not have been understood to withdraw them from the jury, but merely to declare that they did not show or indicate notice conclusively or as matter of law.

3. The only remaining contention argued by the defendant is, that the court finally withdrew from the jury the question whether the plaintiff should be charged with actual or constructive notice of Cassells's fraud. The jury had found that in fact the plaintiff had no knowledge or notice of the limitation of Cassells's authority, nor that he was then acting as an agent of the defendant, and not as a member of the firm. The remaining evidence applicable to the question was not sufficient to warrant a finding that the plaintiff did not take the notes and advance the money to the firm in good faith. There was no dispute that the plaintiff took the notes before maturity and for value. The evidence that Graham, its president, had noticed unusual facts about the bank account, indicating that the firm was not doing a flourishing business, that he had seen Cassells the worse for liquor and had thought of writing to the defendant about him, that he had notified Cassells on account of these things that he would not discount for him to the extent he had been doing, and that he knew that the defendant was in business at Fitchburg

paying little attention to the business in Boston, and so practically at the mercy of Cassells if he was disposed to defraud him, were merely suspicious circumstances, consistent with the plaintiff's good faith, and not sufficient to justify charging it with notice of any infirmity or taint in the transaction. There was no evidence of such recklessness as would be inconsistent with honesty of purpose or good faith. *Smith v. Livingston*, 111 Mass. 342. *Freeman's National Bank v. Savery*, 127 Mass. 75, 79. *Lee v. Whitney*, 149 Mass. 447. *Exceptions overruled.*

JEREMIAH TWOMEY vs. JOHN S. LINNEHAN & another.

Suffolk. December 4, 1893. — March 14, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Writ of Entry — Proof of Title — Instructions to Jury — Defence — Statute of Frauds — Tax Title — Verdict.

In order to maintain a writ of entry, it is not necessary to show an actual wrongful dispossession or exclusion of the demandant, or an adverse possession by the tenant; but, under Pub. Sta. c. 173, §§ 1-4, the demandant is required to prove only that he is entitled to such an estate as he claims, and that he has a right of entry, and if he proves such estate and right of entry he can recover, unless the tenant proves a better title in himself.

If a request for instructions to the jury is incorrect when applied to some aspect of the case, it cannot properly be given.

At the trial of a writ of entry, one of the defences was that the demandant had bargained the locus to the tenants, and had agreed to convey the title to them, and had put them in possession as part of the bargain, and had broken his agreement and refused to fulfil it, and had never since regained possession; and another defence was title in one of the tenants under a tax deed. The jury found specially that the tenants had agreed to pay the taxes until the purchase money should be paid. *Held*, that the tenants had no ground of exception to the refusal to instruct the jury that the sale for non-payment of taxes did not affect the rights that the tenants had under the original contract to purchase.

At the trial of a writ of entry, one of the defences was that the tenant was in possession of the demanded premises under an agreement of sale by the demandant, who had broken his agreement and had not regained possession. The memorandum of sale did not purport to be signed by the demandant. The judge refused to instruct the jury, as requested by the tenant, that there was a sufficient memorandum under the statute of frauds, and, in the instructions given, did not rule that the demandant must have agreed to convey by a memorandum good under the statute. *Held*, that the tenant had no ground of exception.

At the trial of a writ of entry, one of the defences pleaded by the tenants in a joint answer was title in one of the tenants under a tax deed. The tenants requested the judge to rule that, if the demandant was entitled to recover as against the tax title, he could only so recover against one of the tenants. *Held*, that this request was properly refused.

If, at the trial of an action, the jury are correctly instructed that certain facts, if proved, are a legal defence, the defendant is not harmed by the refusal to instruct the jury that those facts are also a defence under St. 1883, c. 223, § 14.

The tenant in a writ of entry cannot maintain his defence by showing title in himself under a tax deed, if the tax sale was suffered or procured by him in violation of his agreement with the demandant to pay the tax.

If the foreman of the jury, at the trial of a writ of entry, to whom is given two printed forms of verdict differing only in the fact that one contains the word "not," by mistake signs the wrong form, and the mistake, which is naturally suggested to the judge by the inconsistency of the verdict with the answer to a question submitted with the verdict, is made certain by the answer of the jury to an inquiry addressed to them by the judge, there is no error in allowing the jury, without again retiring, to amend the verdict, or in receiving and recording the verdict so amended.

WRIT OF ENTRY, against John S. Linnehan and Bessie Linnehan, his wife, to recover possession of certain premises in Chelsea. At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict for the demandant; and the tenants alleged exceptions, which appear in the opinion.

G. A. A. Pevey, for the tenants.

R. Lund, (*P. B. Kiernan* with him,) for the demandant.

BARKER, J. The tenants excepted to the refusal to give certain instructions, to the rulings given, and also to the proceedings by which the verdict first signed was amended in open court and received and recorded. The whole charge is stated, but the exception to the rulings given must be construed to be to those only which were contrary to the requests. At the hearing the exceptions to the refusal to give the requests numbered 2, 3, 4, 5, 8, 9, 12, and 15 were waived.

1. The first, sixth, and seventh requests were upon the theory that an actual wrongful dispossession or exclusion of the demandant, or an adverse possession by the tenants, must be shown to maintain the action. But under our statutes the demandant declaring on his own seisin alleges a disseisin, and is required to prove only that he is entitled to such an estate as he claims, and that he has a right of entry. The suit is prosecuted and conducted as if the demandant had made an actual entry and had been immediately ousted, and if he proves his estate and right

of entry he recovers, unless the tenant proves a better title in himself. Pub. Sts. c. 173, §§ 1-4. It is true that, as provided in § 6 of the same chapter, a person in possession who has actually ousted the demandant, or has withheld possession from him, may be considered, at the election of the demandant, as a disseisor, although he claims an estate less than a freehold; and that one of the defences in the case at bar was an allegation that the demandant had bargained the locus to the tenants, and had agreed to convey the title to them, and had put them in possession as part of the bargain, and had broken his agreement and refused to fulfil it, and had never since regained possession.

But there was a further joint answer of title in one of the tenants under a tax deed, and each of these three requests was incorrect when applied to some aspect of the case, and so could not properly be given. Upon the question whether the tax deed was a better title than that shown by the demandant, it would have been incorrect to rule that an actual wrongful dispossession or exclusion of the demandant, or an adverse possession by the tenants, must be shown to entitle the demandant to recover.

2. As to the tenth request,* the jury found specially that the tenants had agreed to pay the taxes until the purchase money should be paid. And as to the eleventh request,* the question whether there was a sufficient memorandum under the statute of frauds was immaterial, because the instructions given did not hold that the demandant must have agreed to convey by a memorandum good under the statute. And, again, the memorandum does not purport to be signed by the demandant.

3. The thirteenth request, that, if the demandant was entitled to recover as against the tax title, he could only so recover against one of the tenants, was in effect a request to rule that the demandant could not recover against the other tenant, and was properly refused. If the tax title had been the only issue, and John S. Linnehan had disclaimed, the instruction might

* These requests for instructions were as follows:

"10. The sale for non-payment of the taxes does not affect the rights of the tenants that they have under the original contract to purchase, under all the facts in this case.

"11. Under the facts in this case, there is a sufficient memorandum, under the statutes, to bind the demandant to the original contract of purchase."

have been correct ; but in the actual posture of the case the demandant could recover against both tenants, although only one of them was a grantee under the tax title.

4. The fourteenth request may be considered in connection with the exception to the rulings given. As before stated, one of the defences alleged was, in substance, that the demandant had bargained the locus to the tenants and promised them a deed upon considerations to be performed by them, and as a part of his bargain had placed them in possession ; that they had either performed their part of the agreement or had been prevented or excused by the demandant from performing it, and that he had broken his part of the agreement, and that they were yet in possession and had the right of possession under their agreement to purchase. The fourteenth request was, in effect, that these alleged facts would entitle the tenants to be relieved, under St. 1883, c. 223, § 14, against the demandant's cause of action. This is the provision that in actions at law the defendant may "allege as a defence any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action, or against a judgment obtained by the plaintiff in such action." The tenants were not harmed by the refusal to give this instruction. The jury were told that, if there was such an agreement, and the tenants had performed or offered to perform it and had been prevented or excused from performing it, then the demandant would not be entitled to possession, and that he was not entitled to recover unless he was entitled to possession. If correct as a statement of law, it would have been of no advantage to the tenants to state that facts which were a legal defence were also a defence under the statute cited.

The instructions were correct, and sufficient to enable the jury to deal with all the aspects of the case. The tenants could not set up a tax sale which was suffered or procured by them to enforce a tax which they had agreed that they would pay. In other words, the demandant was entitled to avail himself, in answer to the defence of the tax sale, of the fact that that sale was suffered or procured contrary to an express agreement with him that the tenants would pay the tax, because that fact would entitle him to be absolutely and unconditionally relieved in equity against

that defence. See St. 1883, c. 223, § 14. Assuming that the tax was duly levied, and the sale properly made, so that an absolute title under it was in the purchaser, the fraud of the tenants in suffering or procuring the sale entitled the demandant to be absolutely and unconditionally relieved against it as a defence against his writ of entry.

5. There was no error in allowing the jury, without again retiring, to amend the written verdict first signed and handed to the court, or in receiving and recording the verdict so amended. The inquiry of the court was naturally suggested by the written answer submitted with the verdict, which answer was inconsistent with the verdict as first written and signed by the foreman. Two printed forms had been given to the jury, differing only in this, that in one was the word "not." The fact that by mistake the foreman had signed the wrong form, which did not express the verdict upon which the jury had agreed, was made certain by an inquiry not calculated to influence the reply, and an answer which called for no consultation; and when that fact was ascertained the correction of the error was merely a clerical matter. It was proper for the presiding justice to ascertain whether the jury desired to have the correction made, because, even if there had been no mistake, each juror had the right to withdraw his assent to the verdict until it had been received and recorded. But this was a matter for individual action rather than for joint deliberation, and the court might allow the jury to correct the mistake without retiring and consulting by themselves. There was no room for the supposition that they had conducted their deliberations and arrived at their verdict under a misapprehension of the law. They were not called upon to make a verdict which they had not before arrived at or agreed upon. The only question was whether the written verdict was their true verdict, or a clerically erroneous expression of it. The case is not governed by *Kenney v. Habich*, 137 Mass. 421; and, in accordance with those cases which hold that palpable errors in the written verdict may be amended when the verdict is returned into court, the course taken was correct. See *Spencer v. Williams*, 160 Mass. 17, and cases cited; *Winslow v. Draper*, 8 Pick. 170; *Lawrence v. Stearns*, 11 Pick. 501. No doubt the verdict as amended and recorded differed totally in legal effect

from that first signed by the foreman. But the verdict as amended and recorded was the verdict agreed upon, and which but for the error would have been signed. The jury made no change in their verdict, but corrected a wrong statement of it. They already had agreed that the tenants did disseise the demandant, and merely corrected a clerical error. In *Capen v. Stoughton*, 16 Gray, 364, where a sheriff's jury, by a mistake like that made in the case at bar, signed and returned a verdict for the respondents when they in fact had agreed upon and intended to return a verdict for the petitioners, the court speak of the mistake as a clerical error, saying: "The error consisted, not in making up their verdict on wrong principles or on a mistake of facts, but in an omission to state correctly in writing the verdict to which they had, by a due and regular course of proceeding, honestly and fairly arrived." The correction of such errors by the unanimous assent of the jury in open court is, in our opinion, correct upon principle, and is not forbidden by the precedents cited.

Exceptions overruled.

NANCY H. WATSON vs. JOEL R. WYMAN & another.

Suffolk. December 12, 13, 1893. — March 16, 1894.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

Mortgage — Payment by Mortgagor before Maturity by giving Second Mortgage — Effect on Rights of Bona Fide Purchaser of First Mortgage before Maturity and Purchaser of Second Mortgage — Equity — Defence.

A. gave a mortgage of land to B., and, before that matured, gave a second mortgage to B. for a sum including that due on the first mortgage and in satisfaction of it. B. retained in his hands the first mortgage, and afterwards assigned it and indorsed the note secured thereby to C. for value before maturity, and without notice, and on the same day sold the second mortgage to D. *Held*, that D. could not maintain a bill in equity for the cancellation of the first mortgage, but was limited to the right to redeem the land from that mortgage.

Payment of a promissory note before maturity is a personal defence.

BILL IN EQUITY, filed January 5, 1893, against Joel R. Wyman and Irving A. Davis, alleging that on May 22, 1888, the

defendant Wyman, who was seised in fee of a certain parcel of land with the buildings thereon, situated in Chelsea, conveyed the estate in mortgage to one Eben Hutchinson to secure the payment of Wyman's note of even date for \$2,000 in three years from its date, and Hutchinson until on or about October 20, 1890, remained in possession of the mortgage and note; that prior to September 14, 1888, Wyman, having purchased the adjoining lot of land, and desiring to secure a loan of \$2,600 upon both lots, and to discharge the mortgage above described, applied to Hutchinson for a loan of \$2,600 upon the two lots; that thereupon Wyman executed and delivered to Hutchinson a mortgage on both lots to secure a note for \$2,600 payable to Hutchinson, which mortgage was dated September 14, 1888, and afterwards recorded; that upon delivery of the mortgage and the note Hutchinson paid to Wyman the sum of \$600, and for the further consideration of the mortgage acknowledged to have received full payment of the \$2,000 note dated May 22, 1888, and discharged the mortgage to secure the same, and further agreed to have that mortgage discharged upon the record and to deliver up the note of \$2,000; that by a deed of assignment dated September 22, 1888, and recorded, but simultaneously with the delivery of the mortgage by Wyman to Hutchinson for \$2,600, Hutchinson assigned the \$2,600 mortgage to the plaintiff, and received therefor the sum of \$2,600 in money, \$600 of which was paid by him to Wyman as above stated, the balance of \$2,000 being for the purpose of cancelling and discharging the previous note and mortgage of \$2,000 signed by Wyman and at that time owned and held by Hutchinson; that thereafter Wyman, until the month of December, 1892, continued semiannually to pay interest on the \$2,600 mortgage to the plaintiff; that Hutchinson never discharged upon the record the mortgage for \$2,000, nor delivered up to Wyman the \$2,000 note which had been paid, but afterwards executed a deed of assignment of that mortgage, dated October 20, 1890, to the defendant Davis, and at some time unknown to the plaintiff delivered to Davis the mortgage note; that the assignment was without the knowledge or consent of either Wyman or the plaintiff, who had no knowledge of the existence of the previous mortgage, and was made fraudulently, and Wyman never knew of the assignment of that mortgage

until after Hutchinson fled from the Commonwealth, in May, 1892; that Davis contended that the mortgage for \$2,000 so assigned to him by Hutchinson existed as a valid security for the mortgage note, prior to and availing against the plaintiff's mortgage, the same not having been discharged on the record, and had advertised the premises therein described for sale at public auction for the purpose of foreclosing the \$2,000 mortgage; and that the plaintiff was ready and willing and offered to pay any sum that might be found due upon Davis's mortgage, that availed against or was prior to the plaintiff's mortgage.

The prayer of the bill was that Davis might be restrained by injunction from further proceeding with his sale as advertised; that a decree might be entered compelling him to deliver up for cancellation the mortgage so held by him, and to execute a release and discharge of the same; and for general relief.

Hearing before *Knowlton, J.*, who found the following facts. Wyman, at the time of making the second mortgage, applied for a loan of \$600 in addition to the loan for \$2,000 which he had before obtained. By arrangement with Hutchinson the second mortgage and note were made for \$2,600, and \$2,000 of that sum was by agreement of parties appropriated to the payment of the note of May 22, 1888, for that sum, and to the discharge of the first mortgage, and as between the parties that note was then paid, although it remained in Hutchinson's hands. On October 20, 1890, Davis bought the first note and mortgage, and paid \$2,000 therefor, the accrued interest appearing by indorsements on the note to have been paid; and he bought in good faith, in the belief that the note and mortgage were good and valid obligations in the hands of Hutchinson. The assignment of the mortgage to the plaintiff was recorded immediately after its date, but the assignment to Davis was not recorded until July 9, 1892. There is due Davis the whole principal of the note of \$2,000, and interest from May 22, 1892. The first of the mortgages was recorded on May 25, 1888, and the second on September 25, 1888.

A decree was thereupon entered, sustaining the validity of the mortgage held by Davis, and ordering that, upon the payment by the plaintiff to him within a time limited of the sum of \$2,000 and interest from May 22, 1892, Davis should release

and discharge the premises from the mortgage; and that, in default of such payment, Davis should hold the premises free and discharged of the mortgage, and the bill should be dismissed.

The plaintiff appealed to the full court.

S. L. Whipple, for the plaintiff.

B. B. Jones, for the defendant Davis.

HOLMES, J. This is a bill in equity for the cancellation of a mortgage, but containing an offer to pay any sum that may be found due upon it. The defendant Davis took an indorsement of the note and an assignment of the mortgage for value before maturity, and without notice. Before he did so the mortgagor had given the mortgagee a second mortgage for a sum including that due on the first mortgage and in satisfaction of it, but had left the first mortgage in the mortgagee's hands. On the same day the plaintiff bought the second mortgage.

Payment of the mortgage note on the day when it falls due is performance of the promise, and very possibly would discharge the note even as against one who took it for value and without notice later on the same day. But payment before the day, or a satisfaction like that in the present case, is a defence which binds only the party receiving payment and those who stand in his shoes. *Burbridge v. Manners*, 3 Camp. 193, 194. *Morley v. Culverwell*, 7 M. & W. 174, 181, 182. *Kernohan v. Durham*, 48 Ohio St. 1, 7. *Head v. Cole*, 53 Ark. 523, 524. *Palmer v. Marshall*, 60 Ill. 289, 293. See *Wheeler v. Guild*, 20 Pick. 545, 552, 553, 555.

It commonly is assumed that the mortgage follows the note, and that if the holder can recover on the note he may avail himself of the mortgage. *Taylor v. Page*, 6 Allen, 86. *Carpenter v. Longan*, 16 Wall. 271. Jones, Mort. (4th ed.) §§ 834-840. We are of opinion that this is the law where the note has been paid in full in advance. As is pointed out in *Morley v. Culverwell*, *ubi supra*, payment before the day is not performance of the contract, and it follows, notwithstanding the language often used, that in a strict sense it does not satisfy the condition of the mortgage. If we are right in our concession as to the effect of a payment on the day, we have here the technical reason for the different effect of an earlier payment. The note still stands unperformed, and therefore secured, subject only to a personal

defence, as it is happily called by Mr. Ames. 2 Ames, Bills & Notes, 811. But the very meaning of a personal defence is, that it does not accompany the note into all hands, but only into those which are in no better position than the person against whom it has accrued. Like fraud or duress by threats, it leaves the legal transaction still in full force, and only furnishes a reason why a particular person should not be allowed to insist upon it. It "all proceeds upon an *argumentum ad hominem*. It is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." Eyre, C. J., in *Collins v. Martin*, 1 B. & P. 648, 651, cited by Shaw, C. J., in *Wheeler v. Guild*, 20 Pick. 545, 551.

Another argument drawn from the registry laws deserves consideration. A mortgage cannot be extinguished more effectually than by a release. Yet we presume that it hardly would be argued that an unrecorded release would be valid as against a purchaser of the mortgage before maturity and without notice. As was said in a case which settled the law for Massachusetts, "a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it. . . . It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity." *Dow v. Whitney*, 147 Mass. 1, 6. It might be thought that the same considerations apply to a quasi discharge by payment of the whole amount in advance. The mortgagor may have an entry made on the margin of the record of the mortgage. Pub. Sts. c. 120, §§ 24, 25. When no such entry is made, and the registry contains no notice of payment of any kind, it would seem that one to whom the mortgagee produces the note not yet due and the mortgage for sale has the same right to assume that the record title is the true title that he would have had in the case of an unrecorded release. If the note were overdue, that would be notice, or would put the purchaser in the position of one having actual notice, and therefore in that case the registry laws would not help him.

In *Grover v. Flye*, 5 Allen, 548, the demandant claimed title

under a sale of an equity of redemption on execution. In fact, the mortgage had been paid in full before it was due, but the record did not disclose the payment, and neither the officer nor the demandant had notice of it. The court held that the rule was the same that it would have been between the original parties. In such a case the purchaser, of course, does not claim as indorsee or holder of the mortgage note. We accept the authority of the decision so far as it goes. But if it is not to be distinguished satisfactorily from one like the present, so far as the argument from the registry laws is concerned, it has no bearing on the considerations first stated, and those are sufficient to dispose of the case. It follows that the decree sustaining the mortgage in the hands of the defendant Davis, and limiting the plaintiff to a right to redeem, was correct.

Decree affirmed.

WILLIAM J. BIGGERSTAFF vs. MARIA A. MARSTON.

Suffolk. December 14, 1893. — March 19, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Equity Practice — Appeal from Decree — Mortgagor and Mortgagee — Effect of Payment before Maturity and after Assignment — Agency — Modification of Decree.

Upon an appeal from a decree of a justice of the Superior Court dismissing a bill in equity, after a hearing upon the merits, the evidence having been taken under the rule and reported to this court, and there being no findings of fact and no rulings of law, the decree is to stand, unless, after giving due weight to the decision of the justice who heard the case, it clearly appears to be erroneous.

If, upon the evidence before him, it was competent for the single justice who heard a suit in equity to find a state of facts which would justify the decree ordered by him, this court will assume, upon an appeal from the decree, the evidence having been reported, that he has so found, and that the decree is the result of the application of correct rulings of law to those facts.

Upon an appeal from a decree of a single justice dismissing a bill in equity, the evidence having been reported, if facts might be found on an examination of the evidence which would give the plaintiff a right to relief, yet where the finding of those facts depends upon conflicting evidence of the weight of which the justice had the best means of judging, this court cannot say that the decree is clearly erroneous.

If a mortgage and note secured thereby, given by A. to B., are assigned by B. to

C. for value, before maturity and without notice of any failure of consideration, and A., in ignorance of such assignment, makes payments on account of principal and interest to B., who is not the financial agent of C., and who is not asked to and does not produce the note and indorse such payments thereon, but gives receipts therefor, A. in making those payments acts at his own peril, and, not having paid to the owner or the owner's agent, must be held to have acted in his own wrong.

It is not the duty of the purchaser of a mortgage and note secured thereby, before maturity, to notify the mortgagor of his purchase; but it is the duty of the mortgagor, if he proposes to pay the debt before maturity, to require the actual production of the note, when making such payment to the original mortgagee.

The assignee of a mortgage and note secured thereby, before maturity, by allowing his assignor, the original mortgagee, as his undisclosed agent, to receive payments of interest accruing before the maturity of the note, does not, as matter of law, justify the mortgagor in believing that the assignor has authority to receive the principal before it becomes due.

If the assignee of a mortgage given to secure a negotiable promissory note not matured gives the mortgagor no notice of the assignment, the latter is not entitled to continue to treat the mortgagee as owner simply because he believes him to be such.

A decree, dismissing a bill in equity for the cancellation of a mortgage of land and note secured thereby, given by the plaintiff to a third person and by the latter assigned to the defendant, before maturity, the plaintiff having, in ignorance of the assignment, made payments of principal and interest to the assignor, should be modified so as to be without prejudice to the plaintiff's right to redeem the land from the mortgage.

BILL IN EQUITY, filed in the Superior Court on July 22, 1893, for the cancellation of a mortgage of land in Chelsea and promissory note secured thereby, given by the plaintiff to Eben Hutchinson, and by the latter assigned to the defendant. At the hearing, a decree was ordered dismissing the bill; and the plaintiff appealed to this court. The facts appear in the opinion.

S. W. Clifford, for the plaintiff.

W. C. Smith, for the defendant.

BARKER, J. The case is here upon appeal from a decree dismissing the bill, after a hearing upon the merits, the evidence having been taken under the rule and reported to the full court. There are no findings of fact and no rulings of law. We are to give due weight to the decision of the justice who heard the case, and unless his decree clearly appears to be erroneous it is to stand. *Debinson v. Emmons*, 158 Mass. 592, 593, and cases cited. If upon the evidence it was competent for him to find a state of facts which would justify his decree, we must assume that he has so found, and that the decree is the result of the application of correct rulings of law to those

facts. We have carefully considered the evidence, and while facts might be found from it which would give the plaintiff a right to relief, whether those facts should be found depends upon conflicting evidence of the weight of which the justice who heard it had the best means of judging, and we cannot say that his decree was clearly erroneous. He may have found that the plaintiff received the whole sum for which the note and mortgage purport to have been given; that the defendant bought the note and mortgage in the regular course of business before they became due, and for full value, in good faith and without notice of any suspicious circumstances; that the note and mortgage after the defendant's purchase were in her possession, and never in that of Hutchinson, and that the latter was her agent only to collect the interest. Upon the question of his agency, the evidence as it reads seems to favor the plaintiff, but we cannot say how much the appearance of the witnesses ought to weigh, and therefore cannot find that Hutchinson was, as the plaintiff contends, the general financial agent of the defendant, or that he had authority from her to receive payments on account of the principal.

The mortgage and note were dated September 14, 1888, and were payable in two years, with half-yearly interest. They referred to each other, and the assignment to the defendant, dated October 31, 1888, not only assigned the mortgage, but in terms assigned, transferred, and set over the note and claim, although the note was not indorsed. The evidence tended to show that payments were made to Hutchinson on account of principal, on April 21, 1890, \$100; April 29, 1890, \$300; and September 3, 1890, \$200, for all of which he gave receipts. It did not tend to show that the note was produced at any time when these payments or those of interest were made, nor that its production was asked for by the plaintiff, until after he had made his last payment; and he himself testified that he never in making payments asked Hutchinson to produce the note or mortgage, or whether he had assigned them, or to indorse the payments, but simply took the receipts without asking any questions, and never asked to see the note and mortgage.

Assuming that the defendant was a *bona fide* purchaser for value, and before maturity and without notice of any failure of

consideration, and that when the payments on account of principal were made to Hutchinson he was neither the owner nor the holder of the note, nor the agent of the owner to receive the principal, the plaintiff in making those payments upon a negotiable note not yet matured, and which was not produced to him by the person to whom he made the payments, paid at his own peril, and not having paid to the owner or the owner's agent, must be held to have acted in his own wrong. *Wheeler v. Guild*, 20 Pick. 545. *Watson v. Wyman*, ante, 96. Nor can he have credit for his payments of principal on the ground that the defendant had by her conduct held out Hutchinson as having authority to receive them, or by her acts or silence given the plaintiff reasonable cause to believe that Hutchinson had such authority. There was no duty upon the defendant to notify the plaintiff that she had become the owner of the note and mortgage; while, having given a negotiable promissory note not yet matured, there was a duty upon the plaintiff himself, if he proposed to pay before maturity, to require the actual production of the note. *Wheeler v. Guild*, *ubi supra*. By the mortgage the plaintiff had contracted to pay to the mortgagee or his assigns, and by the note to the mortgagor "or order," and by the law of negotiable paper it was not the duty of the purchaser of the note to notify the plaintiff of the purchase, and it was so much the duty of the promisor to see that it had not been transferred that when, without its actual production, he paid to the original payee, he acted in his own wrong. The defendant by allowing the original mortgagee, as her undisclosed agent, to receive payments of interest accruing before the maturity of the note, did not, as matter of law, justify the plaintiff in believing that Hutchinson had authority to receive the principal before it became due. If the plaintiff had in fact known that Hutchinson was receiving the interest as agent, it would not have been a reasonable inference that he was authorized to receive payment of the principal before it was due, and contrary to the terms of the note and mortgage. The plaintiff did not know that the defendant had made Hutchinson her agent to collect the interest, and was not misled by knowledge of this agency. If he were to be released from his obligation to pay to the owner because he had inferred from the fact that no one except Hutch-

inson had asked him to pay the interest, and because no one had notified him that the note and mortgage had been sold, he would in effect be released from an obligation which he had voluntarily assumed toward whomsoever should become the owner of the note. He made his payments in disregard of an obligation to pay to the owner which the law imposed upon him as the promisor in the note and mortgage.

If, as the plaintiff contends, the receipt of a payment by Hutchinson was tantamount to the statement by him, "I hold your note," and the defendant by allowing Hutchinson to receive the interest had enabled Hutchinson to make that statement when a word from her to the plaintiff would have dispelled his illusion as to Hutchinson's ownership, it still was the plaintiff's duty to reply to Hutchinson before making the payment, "If you hold my note, produce it," and, not having done so, it is his own fault that he has paid to the wrong party.

It is true, as the plaintiff contends, that the plaintiff was not charged with notice of the assignment in the registry. See *George v. Wood*, 9 Allen, 80; *Watson v. Wyman*, ante, 96. But it is not the law in this Commonwealth, that, if the assignee of a mortgage given to secure a negotiable promissory note not matured gives the mortgagor no notice of the assignment, the mortgagor may continue to treat the mortgagee as owner simply because he believes him to be such; and in the present case the evidence does not require a finding that the acts of the defendant have justified the plaintiff in believing that Hutchinson was still the true owner of the mortgage.

The decree dismissing the bill ought to be without prejudice to the plaintiff's right to redeem the land from the mortgage, and it should be so modified and affirmed.

So ordered.

MARY A. FARRELL vs. CITY OF BOSTON.

Suffolk. March 22, 1894. — March 23, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Evidence — Correction on Re-examination of Mistake made by Witness on Cross-examination.

It is competent to show, on re-examination of a witness, that a discrediting admission made by him on cross-examination was made by mistake.

TORT, for personal injuries occasioned to the plaintiff, on the evening of December 6, 1890, by an alleged defect in Prentiss Street, in the defendant city.

At the trial in the Superior Court, before *Maynard, J.*, the plaintiff's evidence tended to show an accumulation of ice and snow on the street in question, which was a defect, and in no way protected by any sand, ashes, or other substance.

The defendant called as a witness one Kanze, who testified, in his direct examination, that on December 6, 1890, at six o'clock in the evening, there was a small coating of ice over the sidewalk, very thin at the place where the defect was alleged to exist, and he put some sifted ashes on it. On cross-examination, he was asked when it was, after December 6, 1890, that he was first asked the question as to what the condition of the sidewalk was on that day, and he answered, "To the best of my recollection, I think it was either the 29th or 31st of May, 1893," the date upon which he was called as a witness at a previous trial of this case.

In redirect examination of Kanze, the counsel for the defendant asked the following question: "Let me refresh your recollection whether or not Mr. Devitt came to see you and had some talk with you?" To which the witness answered, "I think Mr. Devitt did come to see me, I am not positive." He was then asked, "You don't remember the date of that?" and answered, "No." The following question was then put to him: "Whether or not you did not, somewhere about the 12th of January, 1891, tell Mr. Devitt that you remembered that the side-

walk was asked that night" (meaning the night of the accident). To this question the plaintiff objected, but the judge admitted it, and the witness answered, "By you refreshing my memory, I believe I did"; and the plaintiff excepted.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

E. Greenhood, for the plaintiff.

S. H. Hudson, for the defendant, was not called upon.

HOLMES, J. The question put on cross-examination obviously was put for the purpose of discrediting the witness's testimony by his admission that he had not been asked, and by implication that he had not spoken, about the condition of the sidewalk, or had his attention directed to it until a date long after the time in question. It was competent on re-examination to show that he was mistaken in his answer, and had spoken about it at a much earlier time. *Commonwealth v. Wilson*, 1 Gray, 337, 340.

Exceptions overruled.

JOSEPH J. CREED vs. MICHAEL D. CREED & another.

Norfolk. March 22, 1894. — March 23, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP & BARKER, JJ.

Money paid — Evidence.

A. bought a stable, mortgaged it to B., and allowed C. to run it. The mortgage being in course of foreclosure by sale, and A. not being able himself to raise the money to pay it, he told C. that if he could find some one who would pay off the mortgage, A. would release to C. all claims to the stable. C. thereupon raised the money and paid the mortgage, and A. gave him a bill of sale of the stable, releasing his interest therein to C. In an action by A. against C. for money paid in the purchase of the stable, A. contended that he bought and paid for it at C.'s request and for his use; and C. contended that A. bought it, not at C.'s request, but substantially as a present for him. A. testified that he sent an attorney "on business relative to this transaction" to attend to A.'s claim, to protect C., and to raise the money if he could. *Held*, that evidence of statements made by A.'s attorney to the attorney representing B. in the foreclosure proceedings, that A. was relinquishing all right to the stable, and C. was thereby making a thousand dollars, was rightly excluded.

In an action for money paid, evidence that the defendant had been summoned or was chargeable in another action, as trustee in respect of the money now sued for, is inadmissible.

CONTRACT, for money paid "by the plaintiff to the defendants' use, at their request," in the purchase of a stable in Norwood. At the trial in the Superior Court, before *Sherman, J.*, the jury returned a verdict for the plaintiff; and the defendants alleged exceptions to the exclusion of certain evidence, the nature of which appears in the opinion.

J. J. Feeley, for the defendants.

E. Greenhood, for the plaintiff.

BARKER, J. 1. The plaintiff bought the stable and mortgaged it to one Ellis, and allowed the defendants to run it. He contended at the trial that he bought and paid for it at the defendants' request, and for their use, and they contended that he bought it, not at their request, but substantially as a present for them.

The mortgage was in course of foreclosure by sale, and Mr. Lane was the attorney who represented the mortgagee in the foreclosure proceedings. The plaintiff could not himself raise the money to pay the mortgage, and told the defendants that, if they could find some one who would raise the money and pay off the mortgage, he would release to them all claims to the stable, and they thereupon raised the money and paid off the mortgage and the plaintiff gave them a bill of sale of the stable releasing his interest therein to the defendants.

The plaintiff testified that he sent Mr. Pearse, an attorney, to Norwood "on business relative to this transaction," to attend to his (plaintiff's) claim, to protect the defendants, and to raise the money if he could. But it does not appear that the statements made by Pearse to Lane, that the plaintiff was relinquishing all right to the stable, and the defendants by reason of that fact were making a thousand dollars out of the plaintiff's action, were material to the negotiations between Lane and Pearse, and they must be treated as matters of conversation outside of the scope of those negotiations. The statements were not made to or acted upon by the defendants, and could not be binding on the plaintiff as to them, and were not admissible in their favor.

2. Whether the defendants had been summoned or were chargeable in another action as trustees in respect of the money here sued for, was immaterial to the question whether the plaintiff was entitled to a verdict in the case at bar. This case

must proceed so far as to ascertain what sum, if any, is due from the defendants; and it is not to be delayed on account of the trustee process, unless continued for judgment in accordance with the statute. Pub. Sts. c. 183, §§ 40-42.

Exceptions overruled.

WILLIAM G. HEAVOR vs. SAMUEL PAGE, executor:

Suffolk. March 22, 1894. — March 23, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Answer in Abatement — Decision of Superior Court.

Under Pub. Sts. c. 152, § 10, and c. 153, § 8, the decision of a justice of the Superior Court upon a question raised by an answer in abatement is final.

CONTRACT, against the executor of the will of Mary R. Popkin, for services rendered at her request. The writ, which was dated May 18, 1891, and returnable to the Superior Court for Suffolk County, described the plaintiff as "of Chelsea" in that county. The defendant answered in abatement, that, at the time of the death of the testatrix, she and the plaintiff each lived and had their usual places of business in Middlesex County, the former in Cambridge and the latter in Everett; and that at the time the action was begun the defendant lived and had his usual place of business in Cambridge, and the plaintiff lived and had his usual place of business in Everett. The plaintiff filed a replication, admitting that, at the time of the death of the testatrix, he lived and had his usual place of business at Everett; and averring that at the time the action was brought he lived in Chelsea.

At the trial in the Superior Court, before *Bond, J.*, there was evidence tending to show that Mary R. Popkin had lived in Cambridge during about fifty years prior to her death, and at the time of her death she lived and had her usual place of business in Cambridge; and that at the date of the writ the defendant lived and had his place of business in Cambridge. There was conflicting evidence upon the issue as to where the plaintiff lived at the date of the writ, the plaintiff's evidence

tending to show that he had removed from Everett to Chelsea in the county of Suffolk on May 6, 1891; and the evidence of the defendant tending to show that he had not removed from Everett to Chelsea until after the date of the writ, and had not changed his domicile by such removal.

The defendant proved that he was appointed executor of the will of Mary R. Popkin on May 13, 1890.

The defendant contended that the provisions of Pub. Sts. c. 161, § 2, were imperative, and "may" in this section should be construed as though it read "must" or "shall"; and requested the judge to instruct the jury that, if the plaintiff and Mary R. Popkin respectively lived and had their respective usual places of business in Middlesex County, the one in Cambridge and the other in Everett, at the time of the decease of Mary R. Popkin, the jury must find for the defendant. The judge declined so to instruct the jury; and the defendant excepted. The judge submitted certain questions to the jury, who found as follows:

1. That Mary R. Popkin resided and had her usual place of business in Cambridge at the time of her death.

2. That the defendant resided and had his usual place of business in Cambridge on May 18, 1891.

3. That the plaintiff resided in Chelsea on May 18, 1891.

Upon the return by the jury of these answers, the judge, against the defendant's objection, directed the jury to return a verdict for the plaintiff; and the defendant alleged exceptions.

D. E. Ware, for the defendant.

C. F. Donnelly, for the plaintiff, was not called upon.

HOLMES, J. Whatever may be our opinion upon the question sought to be raised by the defendant's exceptions we cannot consider it, as the decision of the justice of the Superior Court was final. *Guild v. Bonnemort*, 156 Mass. 522. Pub. Sts. c. 152, § 10; c. 153, § 8.

Exceptions overruled.

ELLEN KELLEY vs. JOHN B. KELLEY.

Essex. November 9, 1893. — March 27, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Foreign Judgment — Jurisdiction — Presumption.

In the absence of anything to show the contrary, there is a presumption that the common law of another State is like that prevailing here; but this presumption does not extend to the statutory law of another State.

Where a question of the law of another State is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at the argument of the case before this court for the purpose of proving the law of such State.

It does not fall within the general jurisdiction of a court of chancery, independently of statutory authority, to annul a marriage for the reason that, when it was contracted, the wife had a former husband living; and there is no presumption that such a court of another State had jurisdiction to entertain a suit of that nature, or in such suit to pass an order for the payment of alimony *pendente lite*, or to enter a final judgment for arrears of alimony, counsel fees, and costs; but the existence of the jurisdiction must be proved at the trial of a suit here to obtain an execution upon the judgment.

PETITION IN EQUITY, filed in the Superior Court, to obtain an execution upon a judgment alleged to have been recovered by the plaintiff against the defendant in the State of New York. Hearing before *Hopkins, J.*, who found for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. The facts appear in the opinion.

C. Brigham, for the plaintiff.

H. F. Hurlburt & D. N. Crowley, for the defendant.

ALLEN, J. In this Commonwealth no power exists in any court to pass an order for the payment of alimony *pendente lite*, or of permanent alimony, in a matrimonial cause of any description, except under provisions of statute conferring such power. By the Constitution of Massachusetts, c. 3, art. 5, it was provided that "All causes of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council until the Legislature shall by law make other provision." By St. 1785, c. 69, § 2, it was enacted that "All marriages, where either of the parties shall have a former wife or

husband living at the time of such marriage, shall be absolutely void"; and by § 3, "Divorces from the bond of matrimony shall be decreed, in case . . . either of them [the parties] had a former wife or husband alive at the time of solemnizing such second marriage." In § 5 certain provisions for alimony are made, but none in case of such void marriage. By § 7, "All questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court." It is not necessary to make special reference to later statutes, which have always since 1785 contained such provisions upon these subjects as seemed expedient to the Legislature; and the authority of the court to decree alimony and counsel fees has always been considered to rest exclusively upon the statutes. *Shannon v. Shannon*, 2 Gray, 285. *Baldwin v. Baldwin*, 6 Gray, 341. *Coffin v. Dunham*, 8 Cush. 404. *Davol v. Davol*, 13 Mass. 264. *West v. West*, 2 Mass. 223, 227. *Orrok v. Orrok*, 1 Mass. 341. In the absence of anything to show the contrary, there is a presumption that the common law of another State is like that prevailing here; but this presumption does not extend to the statutes of another State. *Harris v. White*, 81 N. Y. 532, 544. *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17.

In the case now before us, it appears that in 1877 a husband brought in the Supreme Court of the State of New York a complaint against his wife, seeking to have his marriage annulled and declared void on the ground that at the time of the marriage she had a former husband living. She answered to the complaint, admitting her former marriage, but averring that it was invalid and void because her former husband was then married to another woman, and that these facts were known to the present husband at the time of his marriage to her. The complaint contained no charge of fraud, force, mistake, or lunacy. In 1888 an order was passed reciting the pleadings, and reciting that it appeared satisfactorily to the court that subsequently thereto an order was made, among other things, that the husband pay to the wife ten dollars a week alimony, commencing October 22, 1877; that it also appeared that he had wholly failed to do so from November 5, 1877, though due demand had been made; and that he had failed to prosecute his action, and had departed from the State; and an order was made that the complaint be

dismissed with costs, that her attorney have an extra allowance of \$100, and that the wife recover of and have judgment against her husband for \$6,114, being the amount of alimony due and owing to her under said order, and also for costs and the above allowance; and judgment was entered accordingly on April 17, 1888. It is also recited that counsel appeared for the husband at the time of this order in 1888. Judgment was entered accordingly; and, the husband having removed to this Commonwealth, the wife now brings a suit in equity here praying the Superior Court to order execution to issue upon said judgment. In defence, no direct charge is made that the entry of the judgment was procured by fraud or imposition upon the court, but it is set up, and the court has found as a fact, that on April 27, 1887, about a year before the entry of the judgment in New York, the husband obtained in this Commonwealth a decree annulling his marriage, his wife having been served with process and defaulted for non-appearance. There is nothing to show that this decree of nullity made here was known to the Supreme Court of New York at the time when the judgment there was entered. The order for the payment of alimony *pendente lite* is not set forth in the record, and does not appear otherwise than by the recital in the final order.

The principal question which we have to consider is, whether it appears that the Supreme Court of New York had jurisdiction in the suit for nullity to pass an order for the payment of alimony *pendente lite*, and at the time of dismissing the suit to pass an order for the payment of the arrears of alimony down to the date of the order, and of an allowance for counsel fees, and for costs, and to enter judgment thereon. Jurisdiction may always be inquired into, and a judgment entered without jurisdiction will not be enforced. *Simmons v. Saul*, 138 U. S. 439. *Thompson v. Whitman*, 18 Wall. 457, 468. *Cumington v. Belchertown*, 149 Mass. 223. *Cross v. Cross*, 108 N. Y. 628.

Ordinarily, and where the proceedings of a court of general jurisdiction are according to the course of the common law, there is a presumption in favor of the regularity of its proceedings, and it will be presumed to have had such jurisdiction as it has assumed to exercise, unless the contrary is shown. *Galpin v. Page*, 18 Wall. 350, 365. In the present case, the justice of

the Superior Court reports that the defendant, among other defences, contended that the judgment alleged had not been proved, and he declined to enforce the judgment rendered in New York, but the special ground of his refusal is not stated. So far as appears, no evidence was introduced on the one side or on the other to show the jurisdiction and authority of the court in the matter. No evidence of the law of New York, by statutes or decisions of courts or otherwise, appears to have been presented; and there was nothing to sustain the jurisdiction except the fact that the Supreme Court, which was a court of general jurisdiction, assumed to exercise it. The question is whether this is enough in a proceeding of this kind.

In the argument before us certain statutes and decisions have been referred to which are supposed to bear upon the authority and jurisdiction of the court, and the fact is thus brought to our attention that there are statutes and decisions which relate to the subject. As already mentioned, the common law of another State is presumed to be the same as that which is established here, unless shown to be otherwise; but there is no such presumption in relation to statutes or to local laws or usages. These must be proved as facts at the trial, and where a question of the law of another State is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at the argument of the case before us for the purpose of proving the law of such State. *Hunt v. Johnson*, 44 N. Y. 27. *Hull v. Mitcheson*, 64 N. Y. 639. *Hackett v. Potter*, 135 Mass. 349, 350. *Murphy v. Collins*, 121 Mass. 6. *Ufford v. Spaulding*, 156 Mass. 65, 69.

We therefore are not at liberty to place our decision upon the result of such examination as we might now be able to make, even with the aid of the citations by counsel of the statutes and decisions in New York in respect to marriage and divorce, nullity of marriage, and alimony, except so far as such decisions may throw light upon the rules of common law existing independently of the statutes.

We have, then, to consider in the first place whether it falls within the general jurisdiction of a court of chancery, without statutory authority, to entertain a suit for nullity of marriage in

a case where no fraud, duress, mistake, or lunacy is explicitly charged, and where accordingly no such ground is alleged as would enable such a court to annul an ordinary contract. The complaint of the husband in the present case, as presented to the Supreme Court of New York, only charged as a ground for avoiding his marriage that at the time when it was entered into his wife had a former husband living, and that her marriage to such former husband was in full force and validity. It did not charge that he was led to marry her through deception, or even through ignorance of the facts. No doubt instances sometimes occur where a man and a woman who wish to live together go through a form of marriage, for social or other purposes, taking the chance of subsequent disturbance or trouble, though well knowing that the marriage is void for the reason that one of them has a former husband or wife living, or that they are within prohibited degrees of kin. Both real life and fiction furnish illustrations of this. Such marriages are of course void, and may be declared so under the authority of statutes like those which have long existed in this Commonwealth. St. 1785, c. 69, § 3. Rev. Sts. c. 76, § 8. But in our opinion a court of chancery would decline to act in such a case by virtue of its own inherent jurisdiction, and without the authority of a statute enabling it to do so. The chief aid which we have derived in determining this question comes from the carefully considered decisions in New York, where the court has assumed jurisdiction to declare a marriage void for lunacy; *Wightman v. Wightman*, 4 Johns. Ch. 343; and fraud; *Ferlat v. Gojon*, Hopk. Ch. 478; but has declined for want of jurisdiction to do so for impotence; *Burtis v. Burtis*, Hopk. Ch. 557. In the last case the chancellor said: "The cases in which this court can annul marriages in virtue of its powers as a court of equity must be few and very peculiar; and they must appertain to the jurisdiction of equity." In *Griffin v. Griffin*, 47 N. Y. 134, the same question was incidentally discussed as follows, in a learned and elaborate opinion delivered by Rapallo, J.: "The Court of Chancery of this State has in some cases entertained bills to declare the nullity of marriages independently of any statute conferring jurisdiction. But these were cases in which the marriage was sought to be declared void for some

cause for which chancery had power to cancel or avoid all contracts, such as lunacy or fraud, and it was held that the marriage contract was not excepted from the operation of this general jurisdiction. . . . In all other cases it must be conceded that the jurisdiction of the Court of Chancery of this State, in actions for divorce, either on the ground of nullity or for cause arising subsequent to the marriage, is founded wholly upon the statutes." (p. 188.) The court expressed no definite opinion on the question whether the particular case then before it, which was an action brought by a husband to have the marriage declared void by reason of her former marriage, would be cognizable by the court independently of the statutes (p. 140); and it does not appear in the report of the case whether or not there was any fraud or mistake. The same doctrine above stated was reiterated in the recent case of *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, where the court, by Ruger, C. J., says: "The courts in this State have no common law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute. Previous to the revision of the statutes it was, however, held that the Court of Chancery had authority, by virtue of its general equity jurisdiction, to entertain suits to annul marriage contracts, upon the same grounds which authorized them to annul contracts generally. . . . Beyond this, however, the Court of Chancery refused to go." (p. 463.) Then, after quoting a portion of the passage above cited from the judgment in *Griffin v. Griffin*, the court adds: "The provisions of the Revised Statutes constitute a comprehensive and detailed scheme for the treatment of matrimonial and domestic differences, framed with great care to define the rights and liabilities of the respective parties, and the power and duties of the courts." (pp. 465, 466.) This leaves the impression that at the time of rendering the decision, in 1884, the whole subject was deemed to be covered by legislation, to which the courts must look for their powers and authority; and so far as we know, the same is the case since the adoption of the present Code of that State. See also 2 Bish. Mar., Div. & Sep. §§ 801-809, where the question is treated of, but no definite opinion expressed.

We have come to the conclusion that it does not fall within the general jurisdiction of a court of chancery, independently of authority by statute, to annul a marriage for the reasons set forth in the complaint made by the present defendant against the present plaintiff in the court of New York, and also that no such jurisdiction existed in that court at the time of entering the judgment now under consideration, or was asserted by it; and that whatever the court did it assumed to do under the express or incidental powers conferred upon it by statutes of that State.

We are brought, then, to consider more directly the question whether, in a case of this kind, where the court acted under statutory authority, jurisdiction should be presumed merely from the fact that the court assumed to exercise it. In *Galpin v. Page*, 18 Wall. 350, the court says: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law." (p. 367.) A passage is quoted with approval from *Morse v. Presby*, 25 N. H. 299, 302, as follows: "The jurisdiction in such cases, both as to the subject matter of the judgment and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction, which does not distinctly appear to be within it." And a little further on the court adds: "Where the special powers conferred [by statute] are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." (p. 371.) It is also said in *Sabariego v. Maverick*, 124 U. S. 261, that the presumption in favor of regularity of proceedings does not apply to give jurisdiction in proceedings not according to the common course of justice. In *Holmes v. Broughton*, 10 Wend. 75, it was held that where a claim was founded upon a proceeding in Ver-

mont unknown to the common law, but authorized by a statute of that State, the statute must be set forth, so that the court might see that the proceedings were conformable thereto; and that a general averment that the proceedings were according to the laws of Vermont and fully authorized thereby was not enough; and that the court could not take judicial cognizance of laws of sister States at variance with the common law. This decision was cited with apparent approval in *Harris v. White*, 81 N. Y. 532, 544. In *Embury v. Conner*, 3 Comst. 511, 523, and in *Striker v. Kelly*, 7 Hill, (N. Y.) 9, it was held that the Supreme Court of New York exercised its powers under the New York street law as a court, but that as its powers in such matters were wholly derived from the statutes, and did not belong to it as a court of general jurisdiction, its decisions must be treated like those of a court of special and limited jurisdiction. A similar rule was applied in the Surrogate's Court to a decree of divorce granted by the proper court, but not shown to be within the conditions and limitations prescribed by the statutes. *Lawrence's case*, 18 Abb. Pr. 347. See also *Cullen v. Cullen*, 18 N. Y. St. Rep. 381. For an application of similar doctrine to different subjects, see *Morse v. Presby*, 25 N. H. 299, which is cited and approved in 18 Wall. 371; *Bradley v. Jamison*, 46 Iowa, 68; *Louisville, New Albany, & Chicago Railway v. Parish*, 33 N. E. Rep. 122; *Ferguson v. Jones*, 17 Oregon, 204; *Northcut v. Lemery*, 8 Oregon, 316; *Heatherly v. Hadley*, 4 Oregon, 1, 14; *Gray v. Larrimore*, 2 Abb. U. S. 542; *Belcher v. Chambers*, 53 Cal. 635; *Neff v. Pennoyer*, 3 Sawyer, 274, 299, 300; *Denning v. Corwin*, 11 Wend. 647. The rule is uniform in the case of inferior courts, that their jurisdiction, when brought into question, must be clearly shown. *Thomas v. Robinson*, 3 Wend. 267. *Sheldon v. Hopkins*, 7 Wend. 435. *McLaughlin v. Nichols*, 13 Abb. Pr. 244.

The same rule prevails in Massachusetts. The decision in *Commonwealth v. Blood*, 97 Mass. 538, was placed solely upon this ground, the document produced being treated as if it were a record, though strictly speaking it was not entitled to be so treated; and it was held that the jurisdiction of a court of record in California over the subject of divorce is a special authority not recognized by the common law, and its powers

must be shown, and must appear to have been strictly pursued. A similar decision was made in respect to the jurisdiction of a court of record of another State to decree an absolute and final dissolution of a corporation at the suit of an individual, in *Folger v. Columbian Ins. Co.* 99 Mass. 267, 274; and in respect to a question of the adoption of a child, in *Foster v. Waterman*, 124 Mass. 592. The rule on which these decisions rest is not peculiar to Massachusetts, but, as has been seen, it has a wide recognition elsewhere.

The proceedings which resulted in the judgment in the Supreme Court of New York in the case now before us were not in accordance with the course of the common law. 1 Bish. Mar., Div. & Sep. §§ 71, 128. Jurisdiction to entertain them has not been shown. If the court had jurisdiction over the general subject, and if it should be assumed from the final order that an interlocutory order was actually passed for the payment of alimony *pendente lite*, it has not been shown that the court had authority to pass such order, or at the conclusion of the suit to order payment of arrears of such alimony, or to enter a judgment for such arrears, which should stand as a valid judgment enforceable in other courts. We do not know whether it would possess such authority in respect to alimony, even if it had jurisdiction over the general subject of the suit, or whether such a judgment for arrears of alimony could be enforced in New York by issue of an execution thereon, without further proceedings in court. *Knapp v. Knapp*, 134 Mass. 353. And see *Hoffman v. Hoffman*, 55 Barb. 269; *Galinger v. Galinger*, 4 Lans. 473. The jurisdiction in such cases is usually special, and the remedies special, and we are satisfied that this judgment depends for its validity upon statutes which are not before us, or upon usages or a course of practice with which we are not familiar, and we have not the means of knowing what faith and credit would be given to such a judgment in the courts of the State of New York. 1 Bish. Mar., Div. & Sep. § 128. *Allen v. Allen*, 100 Mass. 373. The justice of the Superior Court rightly refused to issue an execution upon the judgment for the amount of the alimony and counsel fees.

The judgment for costs of suit must rest on the same basis. The proceedings being special, the right to costs must depend

upon the statutes, or upon the inferences to be drawn from them. In *Stevens v. Stevens*, 1 Met. 279, it was held, under our statutes then in force, that where a husband voluntarily discontinued a libel against his wife for a divorce she was entitled to a judgment and execution against him for costs. There was, however, an express statute providing that the court might hear and determine all matters relating to divorce, according to the course of proceedings in ecclesiastical courts and in courts of chancery. Rev. Sts. c. 76, § 38. The court was therefore authorized to allow costs, unless there was something in the relation of husband and wife to prevent, and the court held that there was not, and costs were allowed. The authority of the court in New York, in respect to costs in a proceeding like that before us, for nullity of marriage, is not shown. We suppose it depends, directly or indirectly, upon the statutes, which have not been put in evidence. 2 Barb. Ch. Pract. (2d ed.) 250. 2 Bish. Mar. & Div. (5th ed.) § 866.

For these reasons, without considering other objections, the entry must be, *Decree for the defendant.*

EMERY E. LANE vs. COMMONWEALTH.

Norfolk. January 29, 1894. — March 26, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Writ of Error — Validity of Sentence — Statute.

A sentence to confinement in the house of correction for the term of two years of a person convicted, under Pub. Sts. c. 205, § 4, of endeavoring to "procure another person to commit perjury, though no perjury is committed," the punishment prescribed for which is imprisonment in the state prison not exceeding five years, or in the jail not exceeding one year, is not erroneous, under c. 215, §§ 19, 20; and, although a failure to include in the sentence solitary imprisonment, as prescribed by c. 215, § 23, is error, if such error is not insisted upon the judgment will be affirmed.

WRIT OF ERROR, to reverse a judgment rendered for the Commonwealth, at the December sitting, 1892, of the Superior Court for the county of Norfolk, upon an indictment for endeavoring

to procure one Daniel F. Keene to commit perjury. Plea, *in nullo est erratum*. The facts appear in the opinion.

T. E. Grover, for the plaintiff in error.

G. C. Travis, First Assistant Attorney General, for the Commonwealth.

HOLMES, J. We must take it that the plaintiff in error was convicted, under Pub. Sts. c. 205, § 4, of endeavoring to "procure another person to commit perjury, though no perjury is committed." By that section the punishment is imprisonment in the state prison not exceeding five years, or in the jail not exceeding one year. The sentence was to the house of correction for two years. The plaintiff in error contends that the only sentences to the house of correction warranted by the statutes are either for one year in substitution for imprisonment in the jail, a substitution authorized by Pub. Sts. c. 215, § 3, or for a term not less than three nor more than five years in substitution for imprisonment in the state prison, this substitution being authorized by Pub. Sts. c. 215, § 19. The argument is that the following section, § 20, forbids a sentence to the state prison for a less time than three years, that this represents a statute later than that taken up into Pub. Sts. c. 205, § 4, and must control the general language of that section, and that the only effect of § 19, which represents an act later than Pub. Sts. c. 205, § 4, but earlier than c. 215, § 20, is to authorize a substitution of the house of correction for the state prison in a sentence which might have been executed in the latter.

The result contended for plainly is unintended. For it is that the sentence for the offence in question must be either for not exceeding one year or for not less than three years, and that a sentence for two years is impossible. The language of § 19 is as follows: "When the punishment of solitary imprisonment and confinement at hard labor for a term not exceeding five years is awarded by the court against a convict, such sentence may be executed either in the state prison, jail, or house of correction, except as provided in the following section." The other sections must be read in connection with this, and the true construction has been settled by the court heretofore. "Under these provisions, a convict whose only prescribed punishment is by imprisonment in the state prison for a term of years, if the term actually

awarded is less than three years, must undergo his sentence of confinement to hard labor and solitary imprisonment in the jail or house of correction, and cannot be sentenced to imprisonment in the state prison." *Brown's case*, 152 Mass. 1, 3.

The only error in the sentence is suggested by a later passage in the same decision. See also *Bump v. Commonwealth*, 8 Met. 533, 535; *Stevens v. Commonwealth*, 4 Met. 360, 371. It is said not to be an unreasonable construction of Pub. Sts. c. 207, § 1, the section punishing the crime then in question, which provides for imprisonment in the state prison not exceeding one year, etc., that the form of sentence prescribed by c. 215, § 23, for the punishment of imprisonment in the state prison, shall be awarded to be executed in the jail or in the house of correction. The same reasoning applies to c. 205, § 4, in case of a sentence for less than three years. The form of sentence prescribed by c. 215, § 23, requires solitary imprisonment as well as confinement at hard labor, whereas in this sentence no solitary imprisonment is directed. This is error. But the plaintiff in error does not desire to insist upon it, and therefore the judgment will be affirmed.

Judgment affirmed.



PEOPLE'S ICE COMPANY *vs.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Suffolk. November 17, 20, 1893. — March 27, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Insurance against Employer's Liability for Personal Injuries to Employees —
Construction of Policy — Evidence — Custom.*

An application for insurance against an employer's liability for personal injuries to his employees was for a "policy to be based upon the following statement of facts which are to be considered as warranties," among which were the following: "The employer's address is 240 Ruggles St., Boston. The employer's works are situated at (state all) as above and where cutting ice. The trade or business is ice-dealers. The operations carried on by the work-people are cutting and handling ice. The machinery in use is such as is necessary in cutting ice. There is no information tending to vary the risk, except as herein stated — No. The insurance is to cover the expenditure in wages of five thousand dollars." Upon this application a policy was issued in consideration of a premium which was

therein stated to be "based upon the estimated yearly pay-roll of the employer, amounting to \$5,000," and which also recited that the statements in the application "the employer warrants to be true, and agrees shall be incorporated herein"; and further stated that "the sums paid to the employer shall be for personal injury, within the meaning of this policy, caused to any employee in his service while engaged in the employer's work in any of the occupations or at any of the places mentioned in the schedule hereto," which contained the following: "Description of occupation of employees: All operations connected with the business of ice-dealers." "Places at which employees to whom wages are paid are employed: At 240 Ruggles Street, Boston, Massachusetts, and elsewhere in the service of the employer." *Held*, that injuries caused to employees of the assured by the fall of an ice-house, while in process of construction by him, not in the season for cutting ice, were not within the policy. *Held, also*, that evidence that it was customary for persons in the ice business to erect their own ice-houses was immaterial.

CONTRACT upon a policy of insurance against liability for personal injuries occasioned to the plaintiff's employees, issued to the plaintiff by the defendant. Trial in the Superior Court, before *Braley, J.*, who directed the jury to return a verdict for the defendant; and, at the plaintiff's request, reported the case for the determination of this court. The material facts appear in the opinion.

The case was argued at the bar in November, 1893, and afterwards was submitted on the briefs to all the judges.

R. M. Morse, (*C. E. Hellier* with him,) for the plaintiff.

J. Lowell & H. M. Rogers, for the defendant.

ALLEN, J. In October and November, 1888, before the time when there was any ice to cut, the plaintiff, which was a corporation engaged in the ice business, was building a large new ice-house at Wigwam Pond in Dedham, it already having some smaller ice-houses there, as well as at other places. During the process of construction, the new ice-house fell, causing injury to several of the plaintiff's employees, to whom the plaintiff afterwards paid compensation. The question is whether these injuries were within the policy.

It seems to us that they were not. The policy and the application are to be construed together. The policy, in referring to the application, says, "the statements in which the employer warrants to be true, and agrees shall be incorporated herein."

Looking then first at the application, it gives the annual wages at \$5,000, and applies for a "policy to be based upon the following statement of facts which are to be considered as warranties."

Amongst other things stated are these: "The employer's address is 240 Ruggles St., Boston." "The employer's works are situated at (state all) as above and where cutting ice." "The trade or business is ice-dealers." "The operations carried on by the work-people are cutting and handling ice." "The machinery in use is such as is necessary in cutting ice." "There is no information tending to vary the risk, except as herein stated — No." "The insurance is to cover the expenditure in wages of five thousand dollars."

Upon this application a policy was issued in consideration of a premium which was therein stated to be "based upon the estimated yearly pay-roll of the employer, amounting to \$5,000." The policy stated that "the sums paid to the employer shall be for personal injury, within the meaning of this policy, caused to any employee in his service while engaged in the employer's work in any of the occupations or at any of the places mentioned in the schedule hereto." The policy was to run for twelve months, and there was a provision in the conditions annexed that if the amount of wages paid by the employer in that period should exceed the amount on which the premium had been paid, a further premium should be paid. The schedule above referred to contained the following: "Description of occupation of employees: All operations connected with the business of ice-dealers." "Places at which employees to whom wages are paid are employed: At 240 Ruggles Street, Boston, Massachusetts, and elsewhere in the service of the employer."

Taking the policy and the application together, the risk assumed was for injuries received in connection with the carrying on of the business. No doubt the words used should be construed with reasonable liberality, but they are not broad enough to cover the work of erecting a new and large building which is to be used for storing ice. The erection of new ice-houses or stables for the enlargement or better accommodation of the business is not an operation connected with the business, within the meaning of the policy and application, when construed together. There is a difference between ordinary day by day repairs, which are incident to the carrying on of the business, and the erection of large new buildings which, when completed, are to be used in the business. Such buildings might be built wholly by independent contractors.

Whether they are so or not, the agreement between these parties does not refer to or include an operation of that character. Looking at all of the provisions above recited, we are unable to put so broad a construction upon the risk assumed as would be necessary in order to sustain the plaintiff's case.

Since the contract of the defendant did not include such a risk, it is immaterial whether it was customary for people in the ice business to erect their own ice-houses. The case depends upon the construction of the contract, and the custom if proved would not enlarge the defendant's liability. See *Benson v. Gray*, 154 Mass. 391, and cases there cited; *Davis v. Galloupe*, 111 Mass. 121; *Potter v. Smith*, 103 Mass. 68.

Judgment on the verdict.

OWEN SULLIVAN, administrator, *vs.* FITCHBURG RAILROAD
COMPANY.

Suffolk. November 23, 1893. — March 27, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Master and Servant — Assumption of Risk — Action.

In an action against a railroad corporation for personal injuries occasioned to A., who was in the defendant's employ as a track repairer, the plaintiff's evidence tended to show that A. and three other track repairers, one of whom acted as foreman, were sent to do work on the tracks, taking with them a small platform car provided with handles at each corner for lifting or pushing it, on which to carry their tools; that, as they were proceeding on their way, all being engaged in pushing the car, a "wild" engine, so called, running outside of any schedule time, and of which the men had had no notice, came around a curve in the railroad behind them about two hundred and twenty-five feet away; that, owing to the curve, the engine could not have been seen by the men any sooner, although the foreman kept constant watch for any train approaching in either direction; that they heard no whistle, or bell, or other warning, until the engine was within sixty feet of them, when two short whistles were given; that as soon as the engine was discovered the men made a motion to lift the car off the track, but the foreman told them not to do so but to give the car a push and get out of the way; and that thereupon all the men gave the car a hard push, and the other men jumped to one side and were not harmed, but A., whose movements were not observed by the others, was struck by the engine and injured. It appeared in evidence that it was a part of the duty of trackmen to look out for "wild"

engines; and that they had no other means of protection except to take care of themselves. One of the defendant's rules provided that "wild trains . . . must run cautiously around curves and over grade crossings, looking out for trackmen." *Held*, that the rule had reference to the safety of the train, and not of the trackmen; that the court could not say that A. was subjected to any danger beyond that of which he took the risk; and that the action could not be maintained.

TORT, under St. 1887, c. 270, by the administrator of the estate of William Sullivan, for personal injuries occasioned to the intestate, while in the defendant's employ, by the alleged negligence of the latter. Trial in the Superior Court, before *Fessenden, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered evidence tending to show that the defendant was a corporation owning and operating a railroad between Worcester and Winchendon, and running through the town of Hubbardston; that the plaintiff's intestate, William Sullivan, was in the employ of the defendant as a track repairer, and had been so employed about four years, and was about thirty-five years of age; that soon after seven o'clock on the morning of December 28, 1891, Sullivan, with three others, named Wead, Clary, and Lewis, was sent by one Denny, a foreman of the defendant having charge of the track repairers, from the defendant's depot in Hubbardston to work at a point on the tracks three quarters of a mile from the depot towards Gardner; that Wead was acting as assistant foreman, having charge of the men while at work, in the absence of Denny, the foreman; that the workmen took with them a small platform car called a "push" or "dump" car, provided with handles at each corner for lifting and pushing the same, on which to carry their tools; that there was a curve in the road at a point about half a mile from the depot; that the men were proceeding on their way and had passed this curve, all engaged in pushing the car, when they discovered a locomotive of the defendant, with a tender and small car or caboose attached, approaching them from behind in the same direction, and in charge of an engineer and fireman; that this was a "wild" engine, running outside of any schedule time, and of which the workmen had had no notice; that when first seen by any of the workmen the engine was just coming in sight around the curve, and was about two hundred and

twenty-five feet away; that owing to the curve the engine could not have been seen by the workmen any sooner; that Wead, the boss of the gang, was constantly watching for any approaching train, and kept looking around each way; that when the engine was discovered, and until it had passed them, neither Wead nor the other workmen who were with Sullivan knew or could tell what kind of a train it was, or what the engine was attached to; that when the engine was first discovered all the men were pushing the car, one at each corner, Sullivan being at a rear corner of the car outside the rail; that as soon as the engine was discovered the men at first made a motion to lift the car off the track, but Wead told them not to do so, but to give the car a push and get out of the way, in order, as Wead alleged, that the tools should not be thrown on to the men by the collision; that thereupon all the men gave the car a hard push, and then the three others jumped to one side and were not harmed; that at the time of letting go the car and jumping neither of the men observed whether Sullivan jumped away or not, and neither of them observed Sullivan after giving a push to the car; that the men with Sullivan jumped at the same or nearly the same instant, and had barely time to get out of the way when the engine struck the car; that the distance from the point where it finally stopped was about thirteen hundred and fifty feet; that the engine had sounded no whistle, no bell was rung, and no other warning given, so far as the men knew or heard, until it was within sixty feet of the men, when two short whistles were given; that when the engine stopped Sullivan was found upon the front of the engine; that after the collision Clary, one of the workmen, walked up the track to where the engine was standing, and there found Sullivan in the caboose; that he took him by the hand and asked him if he was dead, and if he knew him, and thereupon Sullivan gave Clary's hand a motion, and that he felt a motion of Sullivan's hand on his own; that at this time Sullivan was breathing or gasping; and that the engine at once returned to the depot at Hubbardston, and after its arrival there Sullivan was taken to Gardner, a distance of seven miles, and there found to be dead.

There was also evidence, objected to by the defendaut, tending to show that when the engine passed the depot at Hubbards-

ton, before the accident and soon after the workmen had left the depot, it was going at a rate of speed equal at least to the speed of ordinary passenger trains when at full speed between stations; and that in crossing or before reaching two highways at grade, one near the depot and the other some distance below it, and both in sight of the depot, or within hearing of persons at the depot, after passing the same, no whistle was sounded, no bell rung, and no other warning given by the engine.

Evidence was also offered by the plaintiff to show that the station agent at Hubbardston depot, who also operated the telegraph at the station, was absent from his post on that morning, no one taking his place, and did not appear until about eight o'clock; that he was usually there about seven o'clock; and that Denny did not, upon this particular morning, in accordance with his custom, in order to protect himself and the other men, attempt to find out from the telegraph operator the condition of the track regarding the running of trains, for the reason that he knew of the absence of the telegraph operator.

The plaintiff also offered evidence of printed rules of the defendant, as follows:

"An order to 'run wild' conveys no rights over any train, and wild trains must keep ten minutes out of the way of regular and extra trains. They must run cautiously around curves and over grade crossings, looking out for trackmen, and must keep out of the way of 'switchers' within yard limit. They may run ahead of freight trains by protecting themselves.

"The engine bell must be rung for a quarter of a mile before reaching every highway crossing at grade, and until it is passed; and the whistle must be sounded at all whistling posts."

It appeared in evidence that the trackmen never had any information as to trains that were running wild, except upon inquiry of a telegraph operator, who informed them when he had the information; that it was a very common thing to have wild trains and engines running over the road, but seldom so early in the morning; that very frequently no notice at all was given when a wild train or engine was coming; that it was a part of the duty of trackmen to look out for these wild trains and engines as far as they could, and that they had no other means of protection except to take care of themselves; that a train was

liable at any moment to come along, and, if the men were out on the road away from the telegraph station, there was no way of warning them except by the approaching train; and that there was nothing in the position of the deceased which would require more time for him to get out of the way than it would for the other men. It was not claimed that Wead was a person in the general exercise of superintendence, whose sole or principal duty was that of such superintendence, but he worked upon the track like the other men, and had no authority except in the absence of the section foreman, when he was the temporary foreman of the gang, and was so acting at the time of the accident.

It further appeared that no one but Sullivan received any injury; that when the order was given by Wead to push the car, Sullivan took hold of the handles and pushed with the rest; and that when Wead gave the order to push the car Sullivan turned around and looked at the locomotive, as did all the other men.

The defendant offered no evidence; and the judge ruled, at the defendant's request, that the evidence was insufficient to maintain the action, and directed a verdict for the defendant. The plaintiff alleged exceptions.

J. B. Goodrich, for the plaintiff.

G. A. Torrey, for the defendant.

HOLMES, J. The bill of exceptions states that it appeared in evidence that it was a part of the duty of trackmen to look out for wild trains, and that they had no other means of protection except to take care of themselves. We do not regard this statement as qualified by the defendant's rule that wild trains "must run cautiously around curves and over grade crossings, looking out for trackmen," but accept the interpretation put upon the rule by the defendant's counsel, that the caution has reference to the safety of the train, not of the trackmen. In this case the other persons on the hand-car escaped, and why the deceased failed to do so does not appear. In the opinion of a majority of the court we cannot say that he was subjected to any danger beyond that of which he took the risk. *Shepard v. Boston & Maine Railroad*, 158 Mass. 174. *Lynch v. Boston & Albany Railroad*, 159 Mass. 586.

Exceptions overruled.

IRA C. BRIDE vs. CHARLES F. CLARK.

Suffolk. December 4, 1893. — March 27, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Promissory Note — Evidence — Exceptions — Foreign Law — Illegal Consideration — Buying and Selling Pools on Horse Races — Action.

A book, offered at the trial of an action as evidence of the law of another State, which does not purport to be published under the authority of the government of that State, nor appear to be commonly admitted and read as evidence in its courts, is rightly excluded.

When parts of a ruling requested were objectionable, but the ruling is not stated in a bill of exceptions to have been refused as a whole for that reason, if a definite request contained in it was correct in law and pertinent to the evidence, and was not in substance given in the charge to the jury, and it is clear that the excepting party was thereby prejudiced and injustice done, a new trial may be ordered.

If the only evidence of the law of another State consists of certain sections of the statutes of that State, the construction of this evidence is for the court.

Under 1 N. Y. Rev. Sts. (pp. 273, 274), §§ 28, 29, the buying and selling of pools on horse races is illegal in that State; and if such a sale is the foundation of the consideration of a promissory note made and delivered in this Commonwealth, no action can be maintained here by the payee against the maker of the note.

CONTRACT, upon a promissory note for \$665.34, dated September 6, 1890, payable six months after date to the plaintiff, and signed by the defendant. At the trial in the Superior Court, before *Richardson, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

P. J. Casey, for the defendant.

H. G. Allen, for the plaintiff.

BARKER, J. The first exception must be overruled, because there is nothing to show that the book offered as evidence of the law of the State of New York, and rejected, was competent. It did not purport to be published under the authority of the government of that State, and there was no evidence that it was commonly admitted and read as evidence in their courts. See Pub. Sts. c. 169, § 71.

The other exception is to the refusal to give a ruling requested. The request included several different elements, one of which

was "that gambling, and such gambling as is described here, is illegal by the laws of New York." If parts of the ruling requested were objectionable, yet as the ruling is not stated to have been refused as a whole for that reason, if a definite request contained in it was correct in law and pertinent to the evidence, and was not in substance given in the charge, and it is clear that the excepting party was thereby prejudiced and injustice done, a new trial may be ordered. The action was upon a promissory note payable to the plaintiff, which the defendant conceded he had signed, and the defences were that it was given without consideration and for an illegal consideration. The note was made and delivered in this State, but the evidence tended to show that the consideration was money which the defendant when attending horse races in the State of New York had there promised to pay for pools which were there sold him on such races. The only evidence of the law of New York consisted of three sections of the statutes of that State; and, as held in *Kline v. Baker*, 99 Mass. 253, the construction of this evidence was for the court alone. The buying of pools on horse races is gambling, and the question was fairly raised whether that form of gambling was illegal by the laws of New York, and for the purposes of the case it was to be decided by ascertaining the construction and effect of the statutes which had been put in evidence, and it was the duty of the presiding justice to instruct the jury upon that point. Copies of two of the sections are annexed to the bill of exceptions, and designated as §§ 28 and 29 of the Revised Statutes, 1 Codes and Laws of New York, 273, 274, or Penal Code, §§ 351 and 352. These sections were read to the jury in the charge, and the presiding justice said, in effect, that § 28 seemed to him not to apply directly to persons who bet, but to persons who occupy buildings or offices for the purpose of receiving or registering bets or wagers, or of selling pools, or who allow buildings or offices to be used for such purposes. This construction of the section seems to us erroneous, and calculated to prejudice the case of the defendant. The section imposes a penalty not only on persons who so occupy buildings or offices, or who allow them to be used for the purposes named, but also, in the clause "and any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of

skill, speed, or power of endurance of man or beast," upon persons who sell such pools as those which the evidence tended to show the defendant had bought, and the price of which was the only consideration for the note in suit. This would make the sale of such pools an illegal transaction, and the price agreed to be paid an illegal consideration. The defendant was entitled to have the ruling given in substance, that such gambling as the evidence tended to show was the foundation of the consideration of the note, namely, the buying and selling of pools on horse races, was illegal in the State of New York, and because it was not given, and the jury were in effect instructed to the contrary, the verdict must be set aside. *Exceptions sustained.*

ELIAS R. HUNNEWELL vs. EDWARD BANGS & another.

Suffolk. December 4, 1893. — March 27, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Eviction — Construction of Lease — Defence.

A lease of a building contained the following clause: "Provided always, that in case the premises or any part thereof shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that they shall be thereby rendered unfit for use and habitation, then and in such case the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation, and in case of such destruction or damage, or a like destruction or damage by any taking or appropriation by public authority for public uses, then the lessor, his heirs or assigns, may terminate this lease." *Held*, in an action for an eviction of the lessee by the lessor, that the fact that the building was destroyed or damaged by fire so that it was thereby rendered unfit for use and habitation was a defence.

HOLMES, J. This is an action for an eviction of the plaintiff, in April, 1892, by the defendants, his lessors. At the trial, the defendants offered to prove that on March 30, 1892, the building demised was destroyed or damaged by fire so that thereby it was rendered unfit for use and habitation, and relied on this fact as giving them a right to end the lease. On April 1, 1892, the

day after the fire, the plaintiff had tendered the full amount of the rent then falling due, without asking any abatement on account of the damages in respect of the last day of the month, and had denied that the premises had been damaged so as to be rendered unfit for use. He had asked no abatement since that time, but the eviction took place within a few days. The presiding judge excluded the evidence, on the ground, of course, that the fact if proved was not a defence. This is the question before us.

The clause of the lease to be construed is as follows: — “Provided always, that in case the premises or any part thereof shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that they shall be thereby rendered unfit for use and habitation, then and in such case the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation, and in case of such destruction or damage, or a like destruction or damage by any taking or appropriation by public authority for public uses, then the lessor, his heirs or assigns, may terminate this lease.”

The grammatical interpretation of these words is plain. “Such destruction or damage” means destruction or damage such that the premises “shall be thereby rendered unfit for use and habitation,” and nothing more. Grammatically, the word “such” does not bring into the last clause the further element of an abatement of rent. If confirmation is needed, the same right of termination is given in case of a “like destruction or damage by any taking,” etc., in which case there is no provision for an abatement of rent. “Like destruction” means destruction like “such destruction,” just before mentioned. It would not be a like destruction if “such destruction” meant a destruction accompanied by abatement of rent.

The plaintiff urges that the word “such” should be laid hold of for the purpose of reaching a construction more favorable to him, and of avoiding a supposed injustice. Extreme cases are put to illustrate the sacrifice of a tenant’s rights which might happen if the words are taken in their strict grammatical sense. The answer to such cases is that leases are bargains, and that it

is not to be supposed that a tenant would make a bargain in which he did not see his advantage. Any chance of loss taken by the lessee is part of the consideration of the lease, and a termination of the lease in accordance with its terms is no more gratuitous than the payment of rent is gratuitous. *Minot v. Joy*, 118 Mass. 308, 311. The tenant can insure his interest if he wishes. On the other hand, a landlord may wish to reserve the right to improve his property, and change essentially the character of the building in case a fire makes some sort of rebuilding necessary. A reference was made to the covenant for quiet enjoyment of the premises, but unless the argument should be pressed to the extent of denying a right to end the lease under any circumstances, the covenant must be limited to the terminable interest demised, and has no bearing on the question when that interest may be ended. See *Brown v. South Boston Savings Bank*, 148 Mass. 300, 304. Finally, those cases have no application which relate to forfeitures imposed merely by way of sanction to some requirement, like the payment of rent, the performance of which is the primary object. *Atkins v. Chilson*, 11 Met. 112, 117. When, as in this case, a forfeiture is an end in itself, not a means of enforcing something else, it cannot be relieved against, and is not to be regarded with hostility. If a landlord bargains for a right to end the lease in case of a fire, the stipulation is to be approached no more adversely than if he had reserved a right to end it by a sale, or by the payment of a hundred dollars.

Verdict set aside.

F. L. Hayes & E. A. Bangs, for the defendants.

G. O. Shattuck & J. H. Benton, Jr., (*J. Woodbury* with them,) for the plaintiff.

GEORGE T. DEWEY vs. DURWALD A. PEELER.

Worcester. October 3, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

*Variance between Judgment and Execution caused by Error of Clerk of Court
— Allowance of Amendment to Execution on Motion in subsequent Action
in same Court.*

The Superior Court has power, where there is a variance between the judgment and the execution issued thereon in an action, which is found to have been caused by a clerical error of the clerk of the court, to allow an amendment, substituting in the execution the name of "A., administrator with the will annexed," for the name "A., special administrator," so as to make the execution accord with the judgment; and it is no objection to the allowance of the amendment that the motion therefor was not made in that action, but in a subsequent action to recover land which was attached in the original action as having been fraudulently conveyed to the present defendant, and upon which the execution was levied, both actions having been brought in the same court for the same county.

LATHROP, J. This is a writ of entry to recover possession of a parcel of land in Westminster. In a previous action brought by George T. Dewey, special administrator of the estate of Sarah Boyden, against Maria L. Peeler, the land in question had been attached, as standing in the name of the tenant, having been fraudulently conveyed to him. During the pendency of the action against Maria L. Peeler, Mr. Dewey was appointed administrator with the will annexed of the estate of Boyden, and was allowed to appear and prosecute the action. A verdict was returned in his favor, and a judgment was entered for him as administrator with the will annexed of the estate of Sarah Boyden. On this judgment execution issued to "George T. Dewey, special administrator of estate of Sarah Boyden." This execution was levied on the land in question by a deputy sheriff, and the land was sold to the demandant. The judgment, execution, officer's return, and sheriff's deed thereunder, were put in evidence; and there was also evidence that the land was fraudulently conveyed to the tenant.

The tenant asked the judge, who tried the case without a jury, to rule that, on account of the variance between the judgment

and the execution, the title did not pass to the demandant. The judge refused so to rule, and found that the variance was a clerical error of the clerk of the court, and might be amended. He also allowed an amendment, substituting in the execution the name of "George T. Dewey, administrator with the will annexed," for the name "George T. Dewey, special administrator," so as to make the execution accord with the judgment. The motion for this amendment was entitled, "George T. Dewey *vs.* Durwald A. Peeler." The judge found for the demandant; and the tenant excepted to the refusal of the judge to rule as requested, to the allowance of the amendment, and to the finding for the demandant. Both the original action and the present action were brought in the Superior Court.

There can be no doubt of the general power of a court to amend its records or its processes so as to make them conform to the truth. *Balch v. Shaw*, 7 Cush. 282. *Fay v. Wenzell*, 8 Cush. 315. *Parker v. Warren*, 2 Allen, 187. *Merrill v. Kaulback*, 158 Mass. 328. *Cawthorne v. Knight*, 11 Ala. 268. The result, therefore, is the same, whether an execution is considered as a part of the record in the case in which it was issued, or as a separate process of the court.

While an execution should follow and conform to a judgment, it is clear that an amendment may be allowed if the execution can be so identified with the judgment and the record on which that judgment is founded that the court can find data by which to make the amendment. *Bishop v. Hall*, cited in *Wells v. Dench*, 1 Mass. 232. *Currier v. Bartlett*, 122 Mass. 133. *Nims v. Spurr*, 138 Mass. 209. *Morse v. Dewey*, 3 N. H. 535. *Blake v. Blanchard*, 48 Maine, 297. *Hayford v. Everett*, 68 Maine, 505. *Corthell v. Egery*, 74 Maine, 41. *Buswell v. Eaton*, 76 Maine, 392. *Lewis v. Avery*, 8 Vt. 287. *Whitehall Bank v. Pettes*, 13 Vt. 395. *Bissell v. Kip*, 5 Johns. 89. *Jackson v. Anderson*, 4 Wend. 474. *Wright v. Nostrand*, 94 N. Y. 31, 47. *Rose v. Ingram*, 98 Ind. 276. In these cases amendments were allowed to make executions conform to judgments, or irregularities were treated as amended without a formal motion being made. See also Herm. Ex. §§ 66 *et seq.*; 1 Freem. Ex. §§ 63, 67 *et seq.*

In the case at bar the judge below found that the variance in the execution was a clerical error of the clerk of the court. We

have no power to revise his finding of fact; and it cannot be said that, on the record before him, he was not fully warranted in so finding.

We are not called upon in this case to determine how far an amendment can be made which affects injuriously the rights of third parties. The finding in this case was in favor of the demandant; and this shows that the tenant was not a *bona fide* purchaser of the land, but had no better title to the land than the defendant in the original action, as whose property it was attached and sold on execution to the demandant.

It is further objected, that the amendment was made on a motion in the case at bar, and that it should have been made in the original action. To this there are two answers. Both actions were in the Superior Court for the same county. 1. It was in the power of that court to amend its records or its processes of its own motion, upon the motion or suggestion of any one, so as to make them conform to the truth. *Balch v. Shaw*, 7 Cush. 282. 2. Where, from an inspection of the record in a case, the court can see that the error is merely a clerical one, it may either, if the record is in that court, amend the error, or treat it as amended, whether the record is in that court or not. *Johnson v. Day*, 17 Pick. 106. *Worthy v. Warner*, 119 Mass. 550. *Currier v. Bartlett*, 122 Mass. 133. *Morse v. Dewey*, 3 N. H. 535. *Corthell v. Egery*, 74 Maine, 41. *Lewis v. Avery*, 8 Vt. 287. *Hayford v. Everett*, 68 Maine, 505. There is also authority for the proposition that where an execution is not void but voidable only, and therefore amendable, errors in it cannot be taken advantage of in a collateral action. *Bissell v. Kip*, 5 Johns. 89. *Hunt v. Loucks*, 38 Cal. 372. *Wright v. Nostrand*, 94 N. Y. 31, 47, and cases cited. Without relying upon this proposition, we are of opinion that, for the other reasons stated, the order must be,

Exceptions overruled.

W. S. B. Hopkins, for the defendant.

T. G. Kent, for the plaintiff.

JOHN KILROY vs. ETHER S. FOSS & another.

Middlesex. November 20, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Assumption of Obvious Risk — Negligence — Action.

A person, while employed in helping to unload stones raised from a wagon and swung into place by a hand derrick, was injured by a stone falling upon his foot. His work was to guide them by a tag-rope, provided for that purpose, and which was long enough to enable him to work in safety. He knew that there was danger that the chain by which a stone was suspended from the derrick might break and the stone fall. There was an open space three feet wide between the line of the stone which fell and a pile of stones on which it was to be put, and, in passing from one place to another in order to guide a stone, he so walked in this open space as to bring his foot directly under the stone, when the chain broke and the stone fell. He might have gone another way by stooping down or crawling under a wagon and passing his rope around a tree, in which case he would not have been exposed to injury by the fall of the stone, and he might have traversed the open space without putting his foot under the stone. He was an experienced hand, had no occasion for haste, and had full control of his own movements and the methods in which he did his work. *Held*, in an action against his employer for the injury, that he voluntarily assumed a risk which was obvious, and his act was careless; and that the action could not be maintained.

TORT, for personal injuries occasioned to the plaintiff, while in the defendants' employ, by the alleged negligence of the latter. Trial in the Superior Court, before *Mason*, C. J., who, at the defendants' request, ruled that the action could not be maintained, and ordered a verdict for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

P. J. Hoar, for the plaintiff.

C. S. Lilley, for the defendants.

BARKER, J. The plaintiff was helping to unload stones raised from a wagon and swung into place by a hand derrick. His work was to guide them by a tag-rope, which was long enough to enable him to work in safety, and was provided for that purpose. He knew that there was danger that the chain by which a stone was suspended from the derrick might break and the stone fall. There was an open space three feet wide between the line of the stone which fell and a pile of stones on

which it was to be put, and in passing from one place to another in order to guide a stone he so walked in this open space as to bring his foot directly under the stone, when the chain broke and the stone fell. He might have gone another way by stooping down or crawling under a wagon and passing his rope around a tree, in which case he would not have been exposed to injury by the fall of the stone, and he might have traversed the open space without putting his foot under the stone. He was an experienced hand, had no occasion for haste, and had full control of his own movements and of the methods in which he did his work. There was no good reason for placing his foot under the stone, and none, except that it was less convenient, why he should not avoid all possible danger by going farther around and stooping under another wagon. When, under such circumstances, he chose to place his foot under a stone which he knew might fall, he voluntarily assumed a risk which was obvious, and his act was careless. He may have thought the risk was not great, but there was no adequate reason why he should incur it, and he assumed it voluntarily, when his employer had furnished him with the means of doing his work in safety.

The cases of *Hackett v. Middlesex Manuf. Co.* 101 Mass. 101, and *Spicer v. South Boston Iron Co.* 138 Mass. 426, relied on by the plaintiff, are not in point. In each of those cases the plaintiff was injured by the fall of part of a permanent structure, which he had a right to believe was in no danger of falling, while in the case at bar the appliances were in their nature temporary, and the danger that the stone might fall by the breaking of a chain was known and understood. In the cases cited it was expected that the persons injured might in the usual course of their employment place themselves where they would be hurt if the structure above them gave way, while in the case at bar the plaintiff need not have placed himself under the stone, and was furnished with the tag rope to enable him so to work as not to expose himself to injury if a stone should fall.

Exceptions overruled.

ROSANNA O'GARA vs. PATRICK NEYLON.

Suffolk. November 22, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Dower — Widow's Right after Twenty Years from Husband's Death without continued Occupancy of Land — Statute — Bar.

Where a widow has not continued to occupy, with the heirs of her deceased husband, land of which he died seised, or to receive her share of the rents and profits thereof, her right of dower is not saved, under Pub. Sta. c. 124, § 13, by the fact that she occupied the land and received the rents and profits with the heirs for several years, if her writ is not brought when she ceases to occupy the land or to receive the rents and profits, and not until more than twenty years after his death, but is barred by § 14.

BARKER, J. This is a writ of dower dated October 17, 1891. The demandant's husband died seised of the land on December 24, 1866, leaving the demandant and two children, one of whom was six and the other nine years of age. The demandant occupied the land with the children until 1870, when she moved away, leaving the place in charge of a neighbor, and continued to receive rent up to December 7, 1875. Since that date she has received no rent. Administration on the estate of the demandant's husband was granted on May 11, 1885, to a public administrator, on a petition representing that the deceased had died not leaving a known widow or heirs in this Commonwealth, and the land was duly sold by the administrator on August 25, 1885, for payment of debts and charges of administration. Upon the settlement of the administrator's account, it appears that the sum of \$56.25 was paid by him to the demandant, and other sums to the two children. There were no assets except the proceeds of the sale of the land. The purchaser was one Murphy, who, on December 29, 1887, conveyed the land to one Walsh, who, on May 17, 1888, conveyed it to the tenant, who purchased it in good faith and for valuable consideration, and who had no notice of any right or claim of the demandant or of any prior occupation of the land by her.

The tenant pleads that no claim or action for the demandant's interest in her husband's estate was made or commenced by the

demandant within twenty years after the death of her husband, and that her claim for dower is therefore barred under the provisions of Pub. Sts. c. 124, § 14, while the demandant contends that because, after her husband's death, she continued to occupy the lands with his heirs until 1870, and to receive the rents until December 7, 1875, her right of dower is not barred by the provisions of Pub. Sts. c. 124, § 14, and is saved by the provisions of Pub. Sts. c. 124, § 13.

Both these provisions were considered by the court in the case of *Hastings v. Mace*, 157 Mass. 499, in which the demandant, who had for more than twenty years after her husband's death occupied with his heirs land of which he died seised, was held to be entitled to bring a petition for the assignment of her dower when, after the expiration of twenty years, the heirs sought to hold the land in severalty; and her right in that case was held to be not barred by the provisions of Pub. Sts. c. 124, § 14. That case was between the widow and the heirs of her deceased husband, with whom, until the bringing of her petition for dower, the widow had occupied the land in common, and it did not necessarily involve the effect of Pub. Sts. c. 124, §§ 13, 14, upon the rights of a *bona fide* purchaser who had bought the land more than twenty years after the husband's death, and without notice of the widow's right or claim, or of her occupation of the lands or receipt of rents after her husband's death.

In the decision of the case at bar, we have to determine whether, if the widow has not continued to occupy the lands with the heirs or devisees of her deceased husband, or to receive her share of the rents, issues, and profits, and the land has passed into the ownership of a *bona fide* purchaser for value without notice of her claim or right, or of the fact that she occupied or received the rents with her husband's heirs or devisees, her claim or action can be maintained unless commenced within twenty years from her husband's death.

In the former case the widow, in making her petition against the heirs of her deceased husband for the assignment of her dower, was exactly within the terms of Pub. Sts. c. 124, § 13. She had continued to occupy the lands with the heirs, or to receive her share of the rents without objection from them, until the time when they chose to occupy in severalty, and she then

claimed her interest and brought her petition for dower. In the case at bar the demandant is not within the letter of the Pub. Sts. c. 124, § 13, because she has not continued to occupy the lands with the heirs, or to receive her share of the rents, but ceased to do either nearly sixteen years before demanding her dower of the tenant; nor have the heirs put an end to her occupancy or receipt of rents by seeking to hold the land in severalty, but it has been sold by the administrator of her husband's estate, under whom, and not under the heirs of her husband, the tenant holds. The present action comes within the letter of the provision of Pub. Sts. c. 124, § 14: "No widow shall be entitled to make claim for an interest in her husband's real estate, or to commence an action or other proceeding for the recovery thereof, unless such claim or action is made or commenced within twenty years after the decease of the husband"; and as her present claim was not made until August 30, 1891, while her husband died on December 24, 1866, it is barred by that provision, unless the true construction of both of these sections taken together is that the latter is not, under any circumstances, applicable to claims of a widow who has for any period after her husband's death occupied with his heirs the lands of which he died seised, or received her share of the rents. Such a construction of the sections was not made in *Hastings v. Mace*, *ubi supra*, and in our opinion would not be correct.

The legislation upon the subjects dealt with in the two sections under consideration was reviewed in *Hastings v. Mace*, in connection with the fact that there was no statute of limitations barring a widow's right to dower until the passage of St. 1858, c. 56. In the adoption of the Revised Statutes there was no question of the effect of Rev. Sts. c. 60, § 6, upon any statute of limitation of the widow's right to recover dower, either as against the heirs of her husband, or against his grantees, or those who had purchased of his administrator or of his heirs or devisees. The St. 1858, c. 56, took effect on March 18, 1858, and provided that no person who then was or who might thereafter become a widow should "be entitled to make any claim for dower, or to commence any action or other proceeding for the recovery thereof, unless such claim be made or such action or proceeding be commenced within twenty years from the time

when the decease of her husband shall have taken place," with a proviso that the act should not prevent a widow from claiming dower or commencing an action or other proceeding to recover the same within five years from the passage of the act, whatever length of time might have elapsed since her husband's death, and with a further proviso in case the widow was absent from the Commonwealth or under age, insane, or imprisoned. It would have been possible to construe St. 1858, c. 56, as applicable to all cases, it being within the power of the Legislature to impose a new limitation upon actions if a reasonable time is allowed for the enforcement of existing rights. See *Cull v. Hagger*, 8 Mass. 423, 430; *Smith v. Morrison*, 22 Pick. 430; *Bigelow v. Bemis*, 2 Allen, 496, and cases cited. But when these two sets of provisions with reference to dower were brought forward together in Gen. Sts. c. 90, §§ 6, 7, and were again re-enacted and made to embrace other rights than dower, in Pub. Sts. c. 124, §§ 13, 14, the injustice of holding that a widow who for more than twenty years after the death of her husband, and after March 18, 1863, had occupied jointly with his heirs, or with their assent had received her share of the rents, could not maintain proceedings to have her dower assigned when for the first time her right was disputed and its fruits denied to her became apparent, and led to the decision in *Hastings v. Mace*, that in such a case her right was not barred by the provisions of Pub. Sts. c. 124, § 14. That decision, however, was not intended to go farther than the facts of the case then before the court required, and the literal meaning of Pub. Sts. c. 124, § 14, should not be departed from by construction any farther than the coordinate provision found in Pub. Sts. c. 124, § 13, demands. This demand is met by holding that a widow's claim to dower is barred by the expiration of twenty years from the death of her husband, unless she brings herself within the proviso of § 14 as to absence or disability, or unless she shows her claim to be entirely within the right confirmed by § 13. If she has not continued to occupy with the heirs, or to receive her share of the rents, and does not upon their depriving her of the fruits of her right by seeking to hold the land in severalty, or refusing her a share of the rents, or by conveying to a stranger, bring her proceedings for dower, no injustice is done her by holding that her

claim is barred by the expiration of twenty years from the death of her husband. The statutes, taken together and so construed, give her ample opportunity for the preservation and enforcement of all her rights, and afford no opportunity, either to the heirs of her husband or to purchasers, to defeat them. She can secure and enjoy all the rights given to her by either section of the statute, if she pursues them in the manner provided; and if, after having for a time occupied with the heirs or received her share of the rents, she does not choose to follow the course provided by the statute, she cannot complain of injustice if by her omission or delay her right is barred by a limitation plainly stated in the statute. She must comply with the prescribed provisions in order to preserve and enforce her rights, because it is so written.

For these reasons, we are of opinion that, the demandant not having continued to occupy with the heirs or to receive her share of the rents, her right to dower is not saved by the provisions of Pub. Sts. c. 124, § 18, and, more than twenty years having elapsed since the death of her husband, is barred by the provisions of Pub. Sts. c. 124, § 14.

In arriving at this conclusion we are not influenced by the contention that, if the statute had provided that a widow who after her husband's death had occupied with his heirs or received her share of the rents should never be barred of her right to dower by lapse of time, it would be unjust to purchasers. There are many facts *in pais* which intending purchasers must consider, and which may invalidate their title; and there is no injustice in subjecting them to the risks involved in the ascertainment of such facts and the application to them of the law.

We express no opinion as to the effect of either section upon any right other than that of dower.

Judgment for demandant set aside, and judgment ordered for tenant.

E. L. Rand, for the tenant.

J. P. Leahy, for the demandant.

LEVI H. ROBBINS vs. FITCHBURG RAILROAD COMPANY.

ALICE M. WRIGHT vs. SAME.

Suffolk. November 22, 23, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON,
& BARKER, JJ.*Personal Injuries — Railroad — Negligence — Due Care.*

The plaintiff, who was driving a safe horse attached to a buggy, approached a crossing at grade of the highway with the tracks of a railroad, with which locality he was perfectly familiar. A traveller coming from that direction could see a train for half a mile before he reached a bend in the road, after passing which he could see, sitting in a carriage, some portion of the train until he got within one hundred and four feet of the tracks, when the train was lost sight of during a space of fifty-six feet, and then again came into full view. No train was then due, according to schedule time, but an express train was late. As the plaintiff rounded the bend in the road he looked up the tracks, but saw no train. He knew that for ten years there had been a flagman at the crossing, and that the flagman's wife was accustomed to use the flag. When within thirty to fifty feet of the tracks he first saw the train coming, although he had looked again, and had heard no bell rung or whistle sounded. He saw the flagman's wife at the crossing, but she had no flag and made no signal for him to stop. There was an embankment on each side of the road. He thereupon whipped his horse and got across the tracks, the train passing behind him within about ten feet. The horse then became frightened by the whistle which was sounded, and broke, throwing out the driver and injuring him. *Held*, in an action against the railroad corporation for his injury, that it could not be said, as matter of law, that the plaintiff was negligent at any time before he saw the train; and that upon the question whether he exercised due care in what he did afterwards he was entitled to go to the jury.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs by the alleged negligence of the defendant. The cases were tried together in the Superior Court, before *Aldrich, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiffs were injured by being thrown from a buggy near Hapgood's Crossing, so called, which is about half a mile from the West Acton station, and between it and the Littleton station of the defendant's railroad. Their horse took fright from the noise and whistle of a passing train. The plaintiffs contended that no signal was given of the approach of the train until they were too near the crossing to escape, by ringing the bell, or sounding the whistle, or by the flagman at the crossing.

[illegible]

railroad, is an embankment with a fall of about ten feet. On the southerly side from the same point to the railroad is a stone wall, and an embankment with a fall of about four feet."

On cross-examination he testified as follows: "I thought I had better get across. I did not dare stay where I was. There is a banking down each side of the road. It is a pretty close place. I was ten or fifteen feet from the train when it passed. The train was going very fast, fifty to sixty miles an hour. . . The horse was not skittish. He was a safe horse to use about the cars as far as I know."

The plaintiff Wright testified that, when they first saw the train, they were about thirty or forty feet from the track; and, in substance, corroborated the testimony of Robbins.

William D. Tuttle testified that he drew the plan used at the trial; that he made observations to see if from any point in the road a person could see up the track coming from West Acton; and the result of those observations was stated by him, in substance, as follows. A traveller coming from the direction of West Acton can see a train for half a mile before he gets to the bend in the road; then, as he comes around the bend, sitting in the carriage, he can see some portion of the train until he gets within one hundred and four feet of the rails; then the train is lost sight of during a space of fifty-six feet, at the end of which it again comes into full view for the distance at least of half a mile on the railroad track.

James H. Ireland testified that he lived at Littleton; that he knew the bay mare which the plaintiff Robbins had at the time of the injury, and had known her for four or five weeks; that he had seen her near trains; that she was a good driving horse; that he had seen the plaintiff Wright have her at the Littleton depot within thirty or thirty-five feet of the track when an express train went by; that the mare pricked up her ears, but she had no trouble in holding her; and that she did not jump around at all.

It appeared in evidence that there was an express train which was scheduled to leave at 11 A. M., and to arrive in West Acton at 11:30 A. M., being about four miles from Littleton. It was also testified that there was no other passenger train running in the direction of Littleton than an hour.

The plaintiff Robbins testified, in substance, as follows : " I have been familiar with Hapgood's Crossing, where the accident took place, for forty years ; would cross the tracks there on an average of two or three times a week, sometimes once a day, and sometimes four times a day ; there has been a flagman there for more than ten years, either Mr. or Mrs. Andrew Hapgood ; have seen Mrs. Hapgood there using the flag about a quarter of the time. On December 10, 1891, I got into the buggy to start home at twelve o'clock, noon ; I had a top box buggy ; the horse was a safe bay horse, six years old ; had had it three days, but had known it for three months ; had been near the cars with it the day before. I was sitting on the right hand side and Alice M. Wright on the left hand ; was going about six miles an hour ; it took four or five minutes to get to a bend in the road, just before reaching the crossing from West Acton. As I approached around the bend I looked up toward Littleton ; from there a train can be seen when coming down ; after that it cannot be seen on account of the rise in the ground ; then, as I approached the trees alongside the track, I looked through them up towards Littleton ; I kept looking up, and when I got by the trees I saw a passenger train opposite the old shop. This was the first time I had seen it. There was no bell rung or whistle sounded ; before I saw the train the place was quiet, and there was nothing to prevent me from hearing a bell or a whistle if either had been sounded. When I was near the bridge I saw Mrs. Hapgood standing near the coal-bin getting some coal ; she did not have any flag ; she then walked into the flag-house ; just after I saw the train she ran out of the flag-house and threw up her hands ; she did not then have any flag ; I struck the horse with the whip ; the horse started up and trotted across ; the whistle began to blow when I first saw the train, and blew very loud until after the train had gone by the crossing ; the train went by me about ten feet behind my buggy. My horse broke after I had got across, when the train came past the crossing, with whistle screaming, and I could not hold him ; he plunged down the road to the right and ran into the wall, not more than seventy-five yards from the crossing, and threw me on to the wall. It was the whistle that frightened the horse. On the northerly side of the highway on the side I came up, from near the brook to the

railroad, is an embankment with a fall of about ten feet. On the southerly side from the same point to the railroad is a stone wall, and an embankment with a fall of about four feet."

On cross-examination he testified as follows: "I thought I had better get across. I did not dare stay where I was. There is a banking down each side of the road. It is a pretty close place. I was ten or fifteen feet from the train when it passed. The train was going very fast, fifty to sixty miles an hour. . . The horse was not skittish. He was a safe horse to use about the cars as far as I know."

The plaintiff Wright testified that, when they first saw the train, they were about thirty or forty feet from the track; and, in substance, corroborated the testimony of Robbins.

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James H. Ireland testified that he lived at Littleton; that he knew the bay mare which the plaintiff Robbins had at the time of the injury, and had known her for four or five weeks; that he had seen her near trains; that she was a good driving horse; that he had seen the plaintiff Wright have her at the Littleton depot within thirty or thirty-five feet of the track when an express train went by; that the mare pricked up her ears, but she had no trouble in holding her; and that she did not jump around at all.

It appeared in evidence that there was an express train which was scheduled to leave Littleton at 11.48 A. M., and to arrive in West Acton at 11.54 A. M., the distance being about four miles and seventy-one one-hundredths; and that there was no other passenger train due at that place from the direction of Littleton within an hour and more.

At the close of the plaintiffs' evidence, the judge ruled that the plaintiffs had failed to show that they were in the exercise of due care at the time of the accident; and directed a verdict for the defendant. The plaintiffs alleged exceptions.

The case was argued at the bar in November, 1893, and afterwards was submitted on the briefs to all the judges except *Lathrop, J.*

S. J. Elder & A. A. Wyman, (C. B. Stone with them,) for the plaintiffs.

G. A. Torrey, for the defendant.

ALLEN, J. It cannot be said, as a matter of law, that the plaintiffs were negligent at any time prior to the moment when they first saw the train. No train was then due according to the schedule time, but the train was late. The plaintiff Robbins knew that for ten years there had been a flagman at the crossing, and that the flagman's wife was accustomed to use the flag. She was there on the spot, and was seen by the plaintiffs, and she had no flag and made no signal for them to stop. From this and the other testimony the jury might have found due care up to that moment. *Johanson v. Boston & Maine Railroad*, 153 Mass. 57. *Merrigan v. Boston & Albany Railroad*, 154 Mass. 189. They were then within from thirty to fifty feet of the track, the train was coming, and the question was what to do. The plaintiff Robbins testified that he thought he had better get across; that he did not dare to stay where he was; that there was a banking down each side of the road; and that it was a pretty close place. So he whipped the horse, and they actually got across the track without being hit by the train. Then the horse broke. Instead of going on, perhaps he might have got out and held the horse, or perhaps he might have tried to turn round if there was room. The decision had to be made instantly, and it depended somewhat on the position of the ground and what it was possible to do. It seems to us that it cannot be said, as a matter of law, that the plaintiffs had failed to show that Robbins was in the exercise of due care. The plaintiffs were entitled to go to the jury upon this question.

It was conceded that there was evidence for the jury on the point of the defendant's negligence.

Exceptions sustained.

CARRIE I. KEENE, administratrix, vs. NEW ENGLAND
MUTUAL ACCIDENT ASSOCIATION.

Suffolk. November 23, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Accident Insurance — Burden of Proof — “ Voluntary Exposure to unnecessary Danger ” — Use of “ Due Diligence for Personal Safety.”

In an action upon a policy of insurance against bodily injuries effected “ through external, violent, and accidental means,” containing provisos that no claim shall be valid thereunder “ when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger,” and that the assured “ is required to use all due diligence for personal safety and protection,” the burden of proof is on the defendant to show that the assured did thus expose himself to such danger, or did not use such due diligence.

A policy of insurance was issued against bodily injuries effected “ through external, violent, and accidental means,” containing provisos that no claim should be valid thereunder “ when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger,” and that the assured “ is required to use all due diligence for personal safety and protection.” The assured was killed by being struck by a detached railroad car, which had been kicked there by an engine, and the sight of which was cut off by his umbrella, while crossing the railroad tracks at a point where from one thousand to two thousand persons a day had been in the habit of crossing for years unopposed, although notices had been posted up by the railroad corporation to prohibit it. *Held*, in an action on the policy, that the act of the assured was not necessarily to be deemed a violation of the provisions of the policy; and that the plaintiff was entitled to go to the jury.

CONTRACT, by the administratrix of the estate of Fred L. Keene. upon a policy of insurance against accident. issued by the defendant to the intestate, who was killed while crossing the tracks of the Old Colony Railroad Company at Brockton, on June 4, 1891. Trial in the Superior Court, before *Fessenden*, J., who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant and the plaintiff alleged exceptions. The material facts appear in the opinion.

The case was argued at the bar in November, 1893, and afterwards was submitted on the briefs to all the judges.

E. M. Johnson & J. W. Keith, for the plaintiff.

I. R. Clark, for the defendant.

ALLEN, J. The defendant insured the deceased "against personal bodily injuries effected . . . through external, violent, and accidental means, within the intent and meaning of the provisos and conditions" recited in the policy. The provisos and conditions material to be considered are as follows: "No claim shall be valid under this certificate when the death or injury may have been caused by duelling, fighting, wrestling," or "may have happened in consequence . . . of racing of any description, or of any voluntary exposure to unnecessary danger, hazard, or perilous adventure." "The certificate holder is required to use all due diligence for personal safety and protection." "For injuries received while . . . walking or being on the road-bed or bridge of any railway, the certificate holder or his beneficiary shall be entitled only to the indemnity or death loss provided in the classification of this association for railway employees insured to cover such risks."

Death through external, violent, and accidental means having been proved, the burden of proof was on the defendant to show a voluntary exposure to unnecessary danger, or a want of due diligence. *Freeman v. Travelers' Ins. Co.* 144 Mass. 572. *Badenfeld v. Massachusetts Accident Association*, 154 Mass. 77.

The question is not the same as would arise in an action against the railroad company to recover damages for the accident which caused the death. In such action, the relation of the deceased to the railroad company would probably be that of a bare licensee, to whom the railroad company owed no duty except to abstain from reckless and wanton conduct. *Redigan v. Boston & Maine Railroad*, 155 Mass. 44, and cases there cited. Moreover, there may have been such a want of positive care on his part with reference to approaching cars as would prevent a recovery, the burden being upon the plaintiff in such action to prove due care affirmatively.

In the present action the burden of proof is different, and the questions of due diligence and of voluntary exposure to unnecessary danger arise, not upon general principles of the law of negligence, but upon the construction of the contract of insurance against accidents. Clearly a contract of indemnity against acci-

dents should be construed with more liberality to the assured than the rules of common law, if the same person seeks under them to put the responsibility for his accident upon another.

Looking then at the policy with reference to the subject of the contract of insurance, the first provision relied on in defence is against "any voluntary exposure to unnecessary danger, hazard, or perilous adventure." A voluntary exposure to necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. The policy recognizes that there are some dangers which it is necessary to encounter, as, for example, where there is a chance to rescue persons in deadly peril. See *Tucker v. Mutual Benefit Co.* 50 Hun, 50. There are other dangers which one usually need not encounter if he knows of their existence long enough beforehand, as, for example, the danger from a runaway horse or a coming car; and a merely inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious intentional exposure; something which one is consciously willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence. Great negligence will not necessarily defeat a fire policy. *Johnson v. Berkshire Ins. Co.* 4 Allen, 388. And in the present policy against accidents, upon the evidence, although the jury might well find a voluntary exposure to danger, we cannot say that it would be bound, as matter of law, to do so. It did not appear that the deceased was a trespasser. The testimony tended to show that it was a common thing for persons to cross the railroad tracks all along there where the deceased was crossing. Notices were indeed posted up by the railroad company to prohibit it; but no other attempt was made to stop the practice. Two witnesses testified that from one thousand to two thousand persons a day crossed there, and this habit of so crossing had continued for years. This would go to show that the deceased was not a trespasser. The deceased was not attempting to walk upon the track, or to remain upon it; but he was simply crossing, at a quick pace. He was hit, not by an engine with its noise, but by a detached car, which had been kicked along there, the sight of which was cut off by his umbrella.

Construing the clause in the policy against "voluntary exposure to unnecessary danger" with reference to the subject of the contract, and also in connection with the other provisions against intentional acts, which are found in the same sentence, the act of the deceased as described by the witnesses was not necessarily to be deemed a violation of it.

The next provision is, "The certificate holder is required to use all due diligence for personal safety and protection." This phrase is very general, and certainly it does not mean that the assured must guarantee himself against accidents, nor do we think it means that he shall not recover for any accident to which some want of care on his part may have contributed. He is not required to use all possible diligence, but only all due diligence. Due diligence or care is sometimes said to be reasonable diligence or care, and reasonable care is sometimes said to be the ordinary care of prudent persons. It is not a precise term, but a relative one. In an accident policy, it would not be reasonable to hold that this clause requires of the assured a higher degree of diligence than prudent persons are accustomed habitually to use. Under such a construction, few persons would care to have an accident policy. The due diligence required is not inconsistent with inadvertence, nor with running such risks as prudent and cautious persons habitually run; and upon the evidence the act of the deceased was not necessarily to be deemed a violation of this provision.

This conclusion is made the more clear by a reference to the later provision, which allows a reduced recovery for injuries received while walking or being on the road-bed or bridge of a railway. If walking on the road-bed of a railway will not defeat a claim under the policy, it is not to be supposed that the contract means that merely crossing a railroad track should necessarily have that effect. Whether merely crossing the railroad should in the present case reduce the plaintiff's claim to the lower classification, we do not determine, as this question was not presented by the ruling at the trial, and has not been argued by the defendant. See as to this *Duncan v. Preferred Accident Association*, 27 Jones & Spen. 145.

The defendant has strongly relied on *Tuttle v. Travellers' Ins. Co.* 134 Mass. 175. In that case, the deceased was on a dark

evening running along on a railroad track, and was killed by a train which came up from behind. He made the railroad track his path for travel, and did it unnecessarily. A reference to the original papers in the case shows that it appeared in evidence that the railroad station to which he was going was on the same side of the tracks as the hotel from which he started, and that it could be reached from the hotel by public ways without crossing any tracks. A plan was also referred to, which (speaking from present memory) showed that the convenient and natural mode of going from the hotel to the station, especially in the evening, was by the public ways. Under these circumstances it was held that the act of the deceased in going upon and along the railroad track on a dark evening, when trains were coming and going over it, was an exposure to an obvious and unnecessary danger, and was not using all due diligence for personal safety and protection. That case in its facts and circumstances was quite different from the present.

For these reasons, in the opinion of a majority of the court, the plaintiff was entitled to go to the jury upon the evidence.

Exceptions sustained.

JOHN ROONEY vs. SEWALL AND DAY CORDAGE COMPANY.

Suffolk. December 4, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Dangerous Machine — Risks of Employment — Action — Evidence — Custom.

When a person enters the service of another, he impliedly agrees to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used; and it is immaterial whether he examined the machinery before making his contract or not.

If the proprietor of a factory has in use a projecting set screw for holding the collar on a shaft upon which is a pulley, although there is a safer kind of set screw in common use, he owes no duty to a person entering his employ to box the pulley or shaft, or to change the set screw for a safer one.

A person who was over forty years old and had had considerable experience was employed in a factory to haul piles of soft, loosely coiled hemp along the floor

through a narrow space between a machine and rows of this hemp. The machine was all boxed in except the end of the shaft and two pulleys thereon projecting from one side. One of the pulleys was fixed tight to the shaft, and the other was loose and held in place by a collar flush with the end of the shaft, and fastened by a set screw. The screw and shaft stood about three and a half feet from the floor, and were left exposed. The collar and end of the shaft were round and smooth, but the set screw had a sharp-cornered square head, and stood out perpendicularly from the collar about an inch. He did not know of the set screw, which could not be seen when the shaft was revolving, but was plainly visible when the shaft was at rest; but he was well aware of the danger from the moving pulleys and shaft. While passing the machine in performing his work, he came in contact with it and was injured. *Held*, that he could not maintain an action against his employer for the injury.

In an action for personal injuries occasioned to the plaintiff, while employed in the defendant's factory, by coming in contact with a machine having a dangerous device, which was in use when he entered the employment, evidence of a custom in other factories using similar machines to guard the device is immaterial.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged negligence of the latter. Trial in the Superior Court, before *Thompson, J.*, who allowed a bill of exceptions, in substance as follows.

There was evidence from the plaintiff that, at the time of the accident, his work consisted in hauling piles of soft, loosely coiled hemp along the floor, from two machines called "breakers," to four other machines called "drawing-frames" in the same room. These piles of hemp were about three feet wide, about four feet long, and varied between four and five feet in height; they were hauled along the floor by means of a long-handled hook, which the plaintiff fastened at the bottom of the pile near the floor, and which he held in his right hand, while by getting a hold with his left hand in the hemp about two thirds of the way up from the floor, so as to keep the pile from falling, he walked backwards, dragging it along the floor. Each of these drawing-frames required twelve or fifteen of these piles of hemp at the same time to keep it in operation. These piles were arranged in front of each machine in rows, with three piles in each row, or, taking the rows lengthwise, four or five piles in each row. A different grade or quality of hemp was used by each of these machines. The plaintiff did not know the different grades or qualities himself, but took his information in this regard from the employees in charge of the breakers, from time to time, as required. When each drawing-frame had its full set, it was the

plaintiff's work to leave spare piles in places assigned for them, convenient to each drawing-frame, so that, as the piles ran out, the employees attending the drawing-frames might have these spare piles at hand as required. The plaintiff had no charge or care of any of these machines.

Between the breakers on the one side, and the nearest drawing-frame on the other, there stood a cylindrical machine called a "topper," which was all boxed in except the end of the shaft and two pulleys thereon, projecting from the side next to the first drawing-frame. One of these pulleys, next and close to the machine, was fixed tight to the shaft; the other pulley was loose, and was held in place by means of a collar flush with the end of the shaft, and the collar was held in place by means of a set screw. This set screw and shaft stood about three and a half feet from the floor, and were left exposed. The collar and end of the shaft were round and smooth, but the set screw had a sharp-cornered square head and stood out perpendicularly from the collar about an inch. This machine received its power by means of a belt running from a large pulley on a revolving shaft overhead near the ceiling to this shaft and by a tight pulley as described at the side of the machine. Alongside of this first drawing-frame, and about seven or eight feet back from the topper, was a space about three feet wide, and room for three or four spare piles of hemp in a row, and in this space the plaintiff, by direction of one Stickmyer, who was superintendent of that room, was accustomed to leave so many spare piles for this drawing-frame. When the topper was not in operation, there was an open way in front of it by which he hauled these spare piles of hemp to this space for the first drawing-frame. When the topper was in operation, this way was closed with hemp for use on the machine, and the only way left to reach it was through a narrow space, three or four feet wide, between the topper and the row of hemp piles set in front of the first drawing-frame.

About three weeks after the plaintiff began this work, and three days before the accident, the topper was set in operation for the first time during the plaintiff's employment, and, finding the way by which he was accustomed to haul the spare piles for the first drawing-frame closed, he asked Stickmyer, who was present at the starting of the topper, how he should go, and

Stickmyer directed him to haul these spare piles through the narrow space between the topper and rows of hemp set before the first drawing-frame. This the plaintiff succeeded for the first two days in doing without any accident, by crowding back with his feet the outside row of hemp set in front of the drawing-frame on one side as he passed, and avoiding the belt and revolving pulleys of the topper on the other. On the morning of the third day, as he was hauling either the first or second spare pile of hemp along this space between the topper and line of hemp in front of the first drawing-frame as directed, and just as the pile he was hauling got opposite the shaft or centre of the pulleys, his left hand, about two thirds of the way up in the pile, was suddenly twisted up in the hemp, throwing him bodily about six feet back, and leaving him sitting on the floor clear of the hemp, and facing the topper, with his left forearm torn off below the elbow.

On cross-examination, the plaintiff further testified, among other things, as follows: "I was coming down with this pile of hemp, having the hook in the bottom part, and this left hand about three parts of the way up the pile to keep it steady, from capsizing, watching those pulleys and the belt that I seen was going, to keep the pile as careful as I could and watch that it didn't come nigh the pulleys or the belt. I could see them going, and when I came down my arm got caught in the hemp. I was backing down. I was watching the pulleys and watching the pile of hemp, for fear my pile of hemp would cant in towards the pulleys. I was watching to protect the hemp from the pulleys. I was watching to protect myself as well as the hemp. I was watching the hemp for fear it would capsize, and keeping clear of the pulleys too. I was watching to keep clear myself and watching the pulleys, pulling backwards. There might be some danger if I got caught in the belt."

The plaintiff also testified that he had been a common sailor for about twenty-eight years of his life, going to sea when fifteen years of age, and had little or no knowledge or experience about machinery; that in 1887 he procured a situation as a laborer for the defendant at another factory since torn down, and continued at that work for about three years; that during part of

these years his work consisted in taking oiled hemp after passing through a machine called an "oiler," and piling it up where it was taken to the breakers, but he never had charge of and never had cleaned nor helped to clean any machines; that he then went to sea again for a year as a common sailor; that about four weeks before this accident, which occurred on July 13, 1891, he again procured work of the defendant; that the first week of this service he spent in opening knots of hemp, and piling it up as it came from the bales, a temporary employment; that about three weeks before the accident he was set to the work at which he was injured; that he never knew of the set screw or collar on the shaft of the topper, and had never heard of a set screw or collar, and did not know the purpose or use of a set screw or collar until after the accident; that he could easily see the belt and pulleys as he was passing, and at the time in question he was careful and tried to avoid them, and noticed as he was passing, and immediately after being thrown, that none of the hemp caught in the belt or pulleys; and that no one had warned him of any danger, and he did not know of his own knowledge what caused the accident.

John F. Foley testified that at the time of the accident he was tending and in charge of the topper; that Stickmyer set him to work on it, and it had been in operation only between two and three days at the time of the accident; that he was not looking at the plaintiff the moment the accident happened, but felt a sudden jerk on the machine, and, leaning to the side where the belt and pulleys were, saw the plaintiff seated on the floor against a pile of hemp facing him, and the stump of his left arm sticking up in a fixed position, bleeding; that he saw the hemp scattered around the floor about his machine; that there was no hemp on or about the belt or pulleys or shaft; that he stopped working and went away from the machine for five or six minutes; that about ten or fifteen minutes after the accident Stickmyer brought him a wrench with which to take the pulleys off the shaft; that he then found that the collar and set screw were off the shaft, and, without the use of the wrench, took the pulleys off with his hands; that prior to working on this machine he had worked on another topper in the same room; that he cleaned the machine once every day, and was familiar with its construc-

tion; that the set screw and collar were in place to keep the loose pulley on the shaft; that dust and dirt from the machine accumulated about them; and that the pulleys and shaft revolved rapidly, making about fourteen or fifteen hundred revolutions per minute, and when in operation the set screw could not be seen.

M. H. Barker, who was familiar with the construction of all kinds of machinery, and the uses of set screws and collars, testified that there were two kinds of set screws, one with square head projecting from and above the collar, the other with the head sunk into and perfectly smooth with the surface of the collar; that for the purposes intended one kind was just as good and reliable as the other, only that the one with projecting head was more convenient to get at; and that at a speed of fourteen or fifteen hundred revolutions per minute a man would not be likely to notice the set screw in question.

The plaintiff then asked this witness the following question: "Suppose that that set screw and collar in the centre of that pulley are about three and a half feet high from the floor, whether or not, in factories and shops and mills where arrangements of that kind are used in a position of that kind, where persons are liable to come in contact with it, there is a custom of in any way guarding that set screw and collar, so that people or things may not come in contact with it." To this the defendant objected. The judge excluded it; and the plaintiff excepted.

The plaintiff then offered to prove by this witness that he not only did know of such a custom, but also that the custom was in such case to either box it all in, or use the kind of set screw which is sunk into and smooth with the surface of the collar. The judge excluded the evidence; and the plaintiff excepted.

Patrick Hallion, an expert, familiar with the building and construction of machinery, testified that a set screw, such as described in this case, on a shaft making fourteen or fifteen hundred revolutions per minute, could not be seen, and could not be seen if making only five hundred revolutions per minute. He also testified in regard to the two kinds of set screws in use as did the preceding witness; and that both kinds were equally effective for the purpose intended.

Edward J. Rockett, who was an expert as to the construction of machinery, testified that there were several kinds of set screws, principally the projecting head, and the kind sunk level with the surface of the collar; that one was as effective to keep the pulleys in place as the other, and the only reason for using the projecting square head was because it was handier to get at; and that there could have been one of those recessed set screws flush with the collar in this case.

The plaintiff then offered to prove by this witness, and by the witness Hallion, that there was a custom of guarding a set screw situated as the one described in this case, either by boxing it up, or by using the kind of set screw sunk level with the collar. The judge excluded this evidence; and the plaintiff excepted.

At the request of the defendant, the judge ruled that there was no evidence for the jury; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar in December, 1893, and afterwards was submitted on the briefs to all the judges.

J. A. McGeough, for the plaintiff.

J. W. Cummings & E. A. McLaughlin, for the defendant.

KNOWLTON, J. When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say, "I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that." In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage.

A projecting set screw is a common device for holding the collar on a shaft, although there is a safer kind of set screw in common use. Under its contract with the plaintiff the defendant owed him no duty to box the pulley or shaft, or to change

the set screw for a safer one. *Coombs v. New Bedford Cordage Co.* 102 Mass. 572.

It is contended by the plaintiff that the defendant was negligent in not warning him of the danger. The rule of law invoked by the plaintiff applies only when there is a danger known, or which ought to be known, to the employer, of which the employee through youth or inexperience is ignorant, and which the employee cannot reasonably be expected to discover by the exercise of ordinary care. In this case, although the set screw could not be seen when the shaft was revolving, it was plainly visible when the shaft was at rest; and while the screw doubtless increased somewhat the danger of being caught by contact with the shaft, belt, or pulleys, that danger was so obvious to every one, and was manifestly so great, that even the most ignorant person would endeavor to keep away from those parts of the machinery. The collar and set screw did not project much beyond the pulleys and belt, but were almost in their line of motion. Although the plaintiff says he did not know of the set screw, his testimony shows that he was well aware of the danger from the moving pulleys, belt, and shaft. He says in a variety of forms of expression that he was doing the best he could to keep clear of the pulleys, and that he was watching to protect himself as well as the hemp. He was more than forty years of age, and had had considerable experience. There is nothing in the case to indicate that he needed any warning of the danger from coming in contact with this rapidly revolving machinery, whether he knew of the set screw or not. Indeed, if the defendant had warned him, he would merely have been told that there was great danger of getting caught if he came in contact with that part of the machinery, and that he must use his best effort to avoid it. But it is evident that he knew all that without warning. It has been held in many similar cases that the accident was not imputable to negligence of the defendant. *Russell v. Tillotson*, 140 Mass. 201. *Ciriack v. Merchants' Woolen Co.* 146 Mass. 182, and 151 Mass. 152. *Goodnow v. Walpole Emery Mills*, 146 Mass. 261. *Crowley v. Pacific Mills*, 148 Mass. 228. *Coullard v. Tecumseh Mills*, 151 Mass. 85. *Pratt v. Prouty*, 153 Mass. 333. *Tinkham v. Sawyer*, 153 Mass. 485. *Henry v. King Philip Mills*, 155 Mass. 361. *De Souza v. Stafford*

Mills, 155 Mass. 476. *Rood v. Lawrence Manuf. Co.* 155 Mass. 590. *Carey v. Boston & Maine Railroad*, 158 Mass. 228. *Hale v. Cheney*, 159 Mass. 268.

The evidence of custom in other factories was immaterial. Assuming that it might have been competent as tending to show negligence of the defendant if the accident had happened to one there by invitation to do business with the defendant, it was of no consequence in view of the plaintiff's implied contract to work with the machinery which the defendant was then using.

Exceptions overruled.

ALEXANDER G. RYDER vs. MARY F. LOOMIS & another.

Barnstable. December 12, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, LATHROP,
& BARKER, JJ.

*Equity — Conveyance of Land — Memorandum of Sale — Trust — Laches —
Statute of Limitations — Bar.*

The description, in a memorandum of sale given by A. to B. of the property sold, as "my right in B. R.'s (my father) estate," if the only real estate which B. R. owned was his homestead in a certain town, which he devised in equal shares to A. and B., is sufficient, within the statute of frauds, Pub. Sts. c. 78, § 1.

A homestead estate was devised in equal shares to A. and B., children of the testator. In 1876, B. signed a memorandum of sale of his share of the estate to A., who thereupon paid B. the price named in the memorandum, which stated no time for performance, and entered into possession of the estate, made permanent improvements thereon, and continued in possession thereof. The testator left debts to a considerable amount and personal property insufficient to pay them, and A. paid the same and discharged the estate from them. In a correspondence between A. and B., the latter expressed his willingness more than once, and as late as 1885, "to stand by" the agreement of sale, and did not refuse to convey to A. until 1889. *Held*, upon a bill in equity brought in 1892 by A. against B. to compel a conveyance of B.'s share of the estate to A., that B. held the legal title as trustee for A.; that the defence of laches had no application; that the statute of limitations did not operate as a bar: and that the bill could be maintained.

The entry of judgment for the tenant in a real action, in which he pleaded *nul disseisin*, is not a bar to a bill in equity by the demandant, to compel the tenant to convey the same land to him, upon the ground of an implied trust arising out of an agreement to sell the land.

BILL IN EQUITY, filed in the Superior Court on April 29, 1892, against Mary F. Loomis and F. A. Loomis, her husband, to compel them to convey to the plaintiff their interest in a certain estate in Yarmouth, upon the ground of an implied trust arising out of the following instrument: "To whom it may concern: This certifies that I, Mary F. Loomis, have sold my right in Benjamin Ryder's (my father) estate to Alexander G. Ryder of New York for the sum of \$100 (one hundred dollars). East Greenwich, R. I., May 13, 1876. Mary F. Loomis. F. A. Loomis."

Hearing before *Hammond, J.*, who reported the case for the determination of this court. The material facts appear in the opinion.

F. J. Daggett, for the defendants.

J. Woodbury, for the plaintiff.

MORTON, J. The parties have argued this case as if the question intended to be presented by it was whether the plaintiff was or was not entitled to relief upon the facts as found by the justice of the Superior Court who heard it. On the assumption that this is the question, we proceed to consider the case.

1. The defendants object that the description of the property in the memorandum on which the plaintiff relies is insufficient within the statute of frauds. What was sold is described as "my right in Benjamin Ryder's (my father) estate." The report finds that the only real estate which Benjamin Ryder owned was his homestead in Yarmouth, Mass., and that he devised it in equal shares to the plaintiff and the defendant Mary. It is well settled that parol evidence may be introduced for the purpose of showing the positions of the parties and their relation to any property that will satisfy the description contained in the memorandum. *Farwell v. Mather*, 10 Allen, 322. *Hurley v. Brown*, 98 Mass. 545. *Mead v. Parker*, 115 Mass. 413. *Doherty v. Hill*, 144 Mass. 465, 468. *Murray v. Mayo*, 157 Mass. 248. Viewed in the light of surrounding circumstances, the description is as if it read "my undivided half in the homestead belonging to the estate of Benjamin Ryder in Yarmouth, Mass." Such a description clearly would be sufficient. *Atwood v. Cobb*, 16 Pick. 227. *Nichols v. Johnson*, 10 Conn. 192. Cases *supra*.

2. The defendants further object that the plaintiff's claim is

barred by the statute of limitations, and that by his laches he has lost the right to relief. It is found that, upon the defendants signing the memorandum, the plaintiff paid them the price named in it, and "entered into possession of the homestead, made permanent improvements thereon, and has remained in sole possession ever since," and that said Benjamin left debts to a considerable amount, and personal estate insufficient to pay them, and that the plaintiff has paid them and discharged the real estate from them. Under these circumstances, the contract being a valid one, the defendant Mary would hold the legal title as trustee for the plaintiff. *Felch v. Hooper*, 119 Mass. 52. *Perry on Trusts*, § 520. The defence of laches has no application. The plaintiff has been in possession with the consent of the defendants, making improvements, and under a contract which he has performed, and delay on his part even for a considerable time after a distinct refusal by the defendants to perform the contract, in the hope of a final settlement or through reluctance to enter upon a family controversy, would not operate to deprive him of a remedy if the defendants had not been led by such delay to a harmful change in their position. *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290, 313. *Waters v. Travis*, 9 Johns. 450. *Hanchett v. Briscoe*, 22 Beav. 496. *Perry on Trusts*, § 850.

In regard to the statute of limitations, it is to be observed, in the first place, that no time for performance was named in the agreement, and that, the defendant Mary holding the legal title as trustee for the plaintiff, he was under no obligation to assert his equitable title till after a distinct repudiation of his right by her. *French v. Merrill*, 132 Mass. 525. In the next place, not only was there no distinct refusal on her part to convey more than six years before the bringing of this bill, but in the correspondence which took place she avowed her willingness more than once, and as late as December, 1885, "to stand by it [the agreement], lost or found." The facts as found do not show that she retreated at all from that position till 1889. The statute of limitations did not therefore operate as a bar.

3. The writ of entry brought by the plaintiff in 1889 only put in issue, under the plea of *nul disseisin*, the legal title. The question whether the plaintiff had an equitable title was not and

could not be in issue. *Russell v. Lewis*, 2 Pick. 508. The entry, therefore, of judgment for the defendant in that action did not constitute a bar to this action.

Decree for the plaintiff.

BRIDGET MULCAHY & another vs. JOSEPH B. FENWICK
& another.

Suffolk. December 13, 1893. — March 28, 1894.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

Equity — Agency — Burden of Proof — Mortgage — Effect of Payment by Mortgagor to Third Person before Maturity and after Assignment — Negligence.

Upon a bill in equity for the cancellation of a mortgage and a note secured thereby, which were obtained from the plaintiff by A., and assigned by the mortgagee, at A.'s request, without the plaintiff's knowledge, to the defendant, if the question whether A. was the defendant's agent, and as such agent received and collected from the plaintiff the principal and interest of the mortgage, is raised by the pleadings, and the facts reported by the justice of the Superior Court who heard the case, without determining it, are as consistent with the theory that A., in making payments of interest to the defendant, was acting for the plaintiff or for himself, as that he was an agent of the defendant, the plaintiff fails to sustain the burden of proving that the payments to A. were in effect payments to the defendant.

A mortgage of land, by the terms of which the mortgagor covenanted to pay the debt to B. "or his executors, administrators, or assigns," and a note secured thereby payable to B. "or order," were given for value by the mortgagor to A., whose clerk B. was, and who allowed his name to be used at A.'s request. On the next day B., also at A.'s request, assigned the mortgage together with "the note and claim thereby secured" to C., who paid value therefor to A. The mortgage and note were delivered to C., who thereafter retained them in his possession, but the note was not indorsed by B. to C. until after its maturity. The mortgagor had no actual notice of C.'s ownership of the mortgage and note, and, assuming that A. was the real party in interest, paid the principal and interest to him before maturity. A. paid to C. only the amounts of interest received by him, and afterwards absconded. *Held*, upon a bill in equity by the mortgagor against C. for the cancellation of the mortgage and note, that the mortgagor made the payments to A. at his own risk; and that the bill should be dismissed, without prejudice to his right to redeem, on paying the principal of the mortgage with interest from the date of the last payment received by C.

Negligence is not imputable to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he receives interest from a third person who offers to see that he receives his interest, or because he does not demand payment at the maturity of the mortgage.

BILL IN EQUITY, filed in the Superior Court, as amended, on April 13, 1893, by Bridget Mulcahy and Daniel Mulcahy, her husband, against Joseph B. Fenwick and Minnie L. Fenwick, his wife, to compel the defendants to discharge a mortgage and surrender a promissory note secured thereby. The bill alleged, and the answer denied, that one Eben Hutchinson was the agent of the defendant J. B. Fenwick, and as such agent received and collected from the plaintiff the principal and interest of the mortgage. Hearing before *Richardson, J.*, who found the following facts.

In or about the year 1885 the plaintiff, Mrs. Mulcahy, became owner in her own right of a parcel of land, with the buildings thereon, situated in Chelsea. Her husband, Daniel Mulcahy, transacted all the business relating to the estate for her, she signing all deeds and documents whenever it was necessary by making her mark, not being able to read or write. About December 1, 1888, when the plaintiffs were erecting a house on the land, Hutchinson, who was an attorney at law, went upon the premises and asked Mulcahy if he desired to borrow some money. Mulcahy replied that he might want some money in a few days. Shortly afterwards Mulcahy called at Hutchinson's office in Chelsea, and the result of the interview between Mulcahy and Hutchinson was that Hutchinson agreed to lend the plaintiffs \$1,100 in money, and also to assume and pay a mortgage of \$1,700 held by Slade and Griffin upon the estate of the plaintiffs, and Mulcahy agreed that the plaintiffs would give Hutchinson a note for the \$2,800, secured by a mortgage on the estate. In pursuance of this agreement, on or about December 7, 1888, Hutchinson lent the plaintiffs \$1,100, paying the same in several sums at different times, and later Hutchinson paid and discharged the mortgage of \$1,700, and on December 7, 1888, the plaintiffs signed a note for \$2,800, and executed a mortgage upon the land in Chelsea for a like sum as security for the note, and gave the note and mortgage to Hutchinson. The note was payable to one Henry H. Letteney "or order," in three years from its date, and by the mortgage the plaintiffs covenanted to pay the debt to Letteney "or his executors, administrators, or assigns." Letteney executed an assignment of the mortgage and note, on December 8, 1888, to Joseph B. Fenwick, one of the defendants,

which recited that he did "hereby assign, transfer, and set over unto the said Joseph B. Fenwick the said mortgage deed, the real estate thereby conveyed, and the note and claim thereby secured." The terms and conditions upon which the money was lent were fixed by Hutchinson and Mulcahy, and without the knowledge of Fenwick, excepting that Fenwick had asked Hutchinson to get a mortgage of \$2,800 for him, and had been told by Hutchinson that he had a mortgage or would get one for him. The note and mortgage were drawn by Hutchinson, or one of his clerks, and were executed by the plaintiffs at his office, and left there with Hutchinson, and the mortgage was recorded by Hutchinson on December 7, 1888, and the assignment was recorded by him on December 13, 1888. The mortgage and assignment were taken from the registry by Hutchinson about ten days after they had been left there to be recorded, and, together with the note and an insurance policy, were delivered by Hutchinson to Fenwick, who has ever since retained possession of them; and the sum of \$2,800 was given by Fenwick to Hutchinson at about that time.

Hutchinson was the only person whom the plaintiffs believed to have any interest in the note. The plaintiffs never had any talk with Letteney until after Hutchinson had absconded, and they never had any conversation with Fenwick until about July, 1892, when Fenwick for the first time stated to them that he held a mortgage upon their premises. Mulcahy paid to Hutchinson the interest on the note of \$2,800 from time to time, and also the principal sum in instalments, on June 19, 1890, November 7, 1890, and March 17, 1891, respectively, and received therefor receipts, the signatures to the same being in the handwriting of Hutchinson. At the times when Mulcahy made the payments to Hutchinson, he saw Hutchinson have a note with the figure \$2,800 in the left-hand corner, and his own signature at the bottom, and Hutchinson appeared to write on the back of the note, saying to Mulcahy, "You don't need a receipt; this indorsement will answer." Fenwick received from Hutchinson the sums of money indorsed on the back of the \$2,800 note held by Fenwick, amounting to \$588, and received no more money from any source on account of the note. These indorsements were all in his handwriting, and were made by him

on or about the dates when the various sums of interest were paid to him by Hutchinson. If the statements of Hutchinson to Fenwick are admissible in evidence, it was shown and admitted that he stated to Fenwick, at the time that he made the first payment of interest, that he, Hutchinson, would see that Fenwick received his interest. No talk ever took place between Fenwick and Hutchinson in regard to payments of any part of the principal. Letteney was a clerk or scrivener in Hutchinson's office, and had no pecuniary interest whatever in the note and mortgage, and no part of the consideration came from him or through his hands, and he simply allowed his name to be used at Hutchinson's request, as he was accustomed to do. Fenwick never, in express terms, authorized Letteney or Hutchinson to collect any part of the principal. Mulcahy never had any conversation with Hutchinson or Letteney as to why the mortgage was made to run to Letteney instead of to Hutchinson.

In July, 1892, Fenwick called at the plaintiffs' house and informed them that he held a mortgage for \$2,800 on their estate. That was the first notice that the plaintiffs had that Fenwick, or any one except Hutchinson, ever had an interest in the note and mortgage, although Fenwick and Mulcahy both lived in Chelsea, and Fenwick knew where Mulcahy lived. When the note for \$2,800 was delivered by Hutchinson to Fenwick it was not indorsed, and remained unindorsed until after its maturity, in January, 1892, Fenwick supposing that he had a good title to the note; after the maturity of the note, he took it to Letteney and requested him to indorse it, which he did, without objection and without consideration.

The assignment from Letteney to Fenwick was taken by Fenwick without question, he having confidence in Hutchinson on account of his official and professional standing. The assignment was drawn in Hutchinson's office, and executed there by Letteney at Hutchinson's request and in his presence. Letteney had no interest in the assignment, received no part of the consideration for it, and none of it passed through his hands. Mulcahy executed the mortgage to Letteney because Hutchinson presented it to him for his signature, and Fenwick received the mortgage from Letteney because it was assigned to him, and without inquiry. The defendant Mrs. Fenwick took an assign-

ment from her husband of the mortgage and note in the usual form, about August 1, 1892, without consideration, and through a third person named McVey. About August 1, 1892, the plaintiffs requested the defendants to execute a discharge of the mortgage and to surrender the note, and they refused to do so.

Upon the above facts, the case was reserved for the consideration of this court.

P. M. Keating, for the plaintiffs.

W. F. Kimball, for the defendants.

BARKEE, J. The case is reserved by a justice of the Superior Court, upon facts found and reported by him, but without any determination or adjudication of the rights of the parties. The question whether Hutchinson was the agent of Fenwick, and as such agent received and collected from the plaintiffs the principal and interest of the mortgage, is one raised by the pleadings, and upon it the plaintiffs have the burden of proof. The facts reported are as consistent with the theory, that, in making the payments which he made to Fenwick, Hutchinson was acting for the plaintiffs, or for himself alone, as that he was an agent of Fenwick. The plaintiffs must therefore be held to have failed to prove that the payments to Hutchinson were in effect payments to Fenwick.

Upon the facts reported, the plaintiffs must be held to have made the payments to Hutchinson at their own risk. They had given a note and mortgage to one Letteney, who was a clerk in Hutchinson's office, and they assumed that Hutchinson was the real party in interest, and made their payments to him. The note was payable to Letteney or order in three years from its date, and on the day after its date the note and mortgage were sold for value to Fenwick, and delivered to him, and thereafter kept in his possession. The assignment of the mortgage to him purported also to assign, transfer, and set over to him the note and claim thereby secured, but the note was not indorsed by Letteney until January, 1892, after maturity. The payments of principal were made to Hutchinson on June 19, 1890, November 7, 1890, and March 17, 1891. The plaintiffs had no actual notice of Fenwick's ownership of the note and mortgage, and he gave them no notice that he was in any way interested in the matter.

As Hutchinson was not the payee of the note, he had no apparent right to receive payment upon it, and in paying to him the plaintiffs acted at their own risk, and must bear the loss. If the note had been non-negotiable, instead of negotiable and not indorsed by the payee, the result must have been the same. The plaintiffs undertook, by the terms of the mortgage, to pay the debt to Letteney "or his executors, administrators, or assigns," and by the note to pay it to Letteney "or order," and they have voluntarily chosen to pay to Hutchinson, who had no right, either from Letteney or the real owner, to receive payment. They are in the position neither of the maker of a negotiable note, who has paid it in due course of business to a holder who produced it in support of his authority to receive payment, nor of a mortgagor, who has paid to his mortgagee, having no knowledge that he has parted with the mortgage.

The plaintiffs contend that Letteney could not maintain an action against them upon the note, because it was not delivered to him and he paid no consideration for it; but the facts reported show that a full consideration moved to the plaintiffs for the note, and that they delivered both note and mortgage as operative instruments. The written assignment made Fenwick the owner of the note, although it was not indorsed, and payment to a stranger did not affect his rights.

The plaintiffs also contend that Fenwick was negligent in not giving the plaintiffs notice of the assignment before the maturity of the note, and that he should therefore bear the loss. But the law does not impute negligence to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he receives interest from a third person, who offers to see that he receives his interest, or because he does not demand payment at the maturity of the mortgage. Fenwick owed no duty to the plaintiffs in this respect, and none of his acts stated in the report require the inference that he was at fault with reference to the plaintiffs.

The result is, that the plaintiffs have shown no right to have the note and mortgage cancelled, and their bill should be dismissed, without prejudice to their right to redeem on paying the principal of the mortgage, with interest from June 7, 1892, and a decree to that effect is to be entered in the Superior Court.

So ordered.

JOHN T. O'BRIEN vs. MALCOLM E. RIDEOUT.

Middlesex. January 10, 1894. — March 28, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Employers' Liability Act.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his fingers cut off by a circular saw upon which he was put to work by the defendant's foreman, it appeared that the plaintiff was hired by the defendant as a common laborer; that the defendant was not present when the plaintiff was put to work on the saw; that on the morning of that day the plaintiff had asked the foreman for permission to saw up some lumber on another saw, and had been refused; and that before that day the plaintiff had worked upon a circular saw six or seven times, three of which were upon the saw which injured him. *Held*, that if, under these circumstances, it was negligent for the foreman to send the plaintiff to work upon the saw, the negligence was that of a fellow workman; and that the action could not be maintained.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his fingers cut off by a circular saw upon which he was put to work by the defendant's foreman, the plaintiff testified that the foreman "kept himself at work pretty much all the time in getting out lumber, or piling it up, or arranging it, and in operating saws." Another workman testified that the foreman was the person who gave him his orders, but he did not know whether he gave orders to anybody else; "that he had also seen him grinding tools, piling lumber, and keeping busy generally"; and that the foreman "kept pretty busy at work and spent most of his time at work." *Held*, that the evidence did not justify a finding that the foreman was a person whose sole or principal duty was that of superintendence, within St. 1887, c. 270, § 1, cl. 2.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration contained two counts, the first, which was at common law, alleging that "said injury was due to the negligence of the defendant, by his foreman and agent, in setting the plaintiff to work on a machine which required an amount of skill which he knew the plaintiff did not possess, and by not notifying the plaintiff of the dangers and perils incident to the use of said machine"; and the second, which was under the employer's liability act, St. 1887, c. 270, § 1, cl. 2, alleging that the plaintiff "was, while in the exercise of due care, injured by a circular saw, upon which he was set to work by the negligence of some person in the service of the defendant intrusted with and exercising superintendence, whose

sole or principal duty is that of superintendence, and who knew the dangerous character of the above described machine." Trial in the Superior Court, before *Bond, J.*, who allowed a bill of exceptions, in substance as follows.

There was evidence tending to prove the following facts.

The plaintiff, who was twenty-six years old, was in the employ of the defendant as a laborer, carrying lumber, and on December 24, 1891, was by the defendant's foreman, Duncan Rideout, directed to work upon a circular saw, called a track saw, sawing butternut wood, saying, "I want you to saw that to the best of your ability; the wood is bad and knotty, and take the best wood out of it that you can find." On the morning of that day the plaintiff had asked Rideout, the foreman, if he and another workman named Duncan McGinnis could saw up some lumber called spare waste on a feed saw, and the foreman said, "No, you do not know anything at all about it." The plaintiff testified that he never worked upon a circular saw before except six or seven times, a few minutes at a time, and three of those times were with the particular saw that injured him, sometimes sawing white wood, sometimes oak wood, and on this particular day sawing butternut wood; that Rideout gave instructions for the work generally in the room where he was employed; that he worked from three o'clock until fifteen minutes past five, sawing butternut wood one and five eighths inches wide and seven eighths of an inch thick; that he had sawed away a strip thirteen inches wide until it was four inches wide, or less, and ran off tapering at the end; that he ran it up against the saw, and it was too narrow for it to go into the saw, and he went to put his hand on both pieces of the wood back of the saw, pinching the wood to shove it and pull it out, and his hand was thrown by the wood and its force up on top of the saw, and his four fingers were cut off; that he was hired to act as a laborer, to pack lumber from the cellar to the planing-mill, carrying it into the basement so that the moulders could use it, and from the dry-house into the cellar; that the defendant was not present when Rideout set him to do this sawing; that he knew if the saw touched his hands it would go through them; that when the board was nearly sawed through, and when his hand had got as near the saw as he thought was safe, he put his fingers

back of the saw to push the board forward through the saw ; that he could pull the board through the saw in that way without getting his hand on the saw ; that he did not put his hand over to the other side of the board and take hold of the other edge of the board, because he did not know that he could pull it out that way ; that on the day before the accident he had seen Rideout, in sawing a board, push it, when nearly finished, through the saw with a stick, and saw that Rideout's fingers did not come near the saw in doing so ; that he did not know of any difficulty in doing the same way himself, but simply did not think of it ; that he had seen Rideout at work on this saw and other saws, and in sorting lumber ; and that Rideout kept himself at work pretty much all the time in getting out lumber or piling it up or arranging it, and in operating saws, and was doing that about all of the time that the plaintiff saw him.

Duncan McInnis testified that Rideout was his foreman, and was the person who gave him his orders ; that he had also seen him grinding tools, piling lumber, and keeping busy generally ; that Rideout was grinder there for the moulders, grinding knives, and taking charge in general of the moulders and the saws ; that he did not know whether Rideout gave orders to anybody else ; that Rideout kept pretty busy at work, and spent most of his time at work ; and that he had seen the plaintiff before the day of his injury at work on this same saw.

George W. Dykeman, an expert called by the plaintiff, testified that he had been a sawyer about twenty-six years ; that a board sometimes kicks, that is, comes over the saw ; that springy lumber will make it ; that butternut wood is springy and dangerous wood to saw ; and that the proper way to get a board through the saw when it was almost sawed through was to push it through with a stick, as the plaintiff had seen Rideout do.

The judge ruled that, upon the declaration and the evidence, the plaintiff could not recover, and ordered a verdict for the defendant ; and the plaintiff alleged exceptions.

J. F. Aylward, for the plaintiff.

H. N. Sheldon, for the defendant.

BARKER, J. 1. The plaintiff was hired as a common laborer, and the defendant was not present when he was put to work

on the saw by the foreman, although the witness had seen the plaintiff at work upon it before the day of his injury. On the morning of that day the plaintiff had asked the foreman for permission to saw up some lumber on another saw, and before that day he had worked upon a circular saw six or seven times, three of which were upon the saw which injured him. If, under these circumstances, it was negligent for the foreman to send him to work upon the saw, the negligence was that of a fellow workman. See *Moody v. Hamilton Manuf. Co.* 159 Mass. 70, and cases cited.

2. The evidence does not justify a finding that the foreman by whom the plaintiff was set to work upon the saw was a person whose sole or principal duty was that of superintendence. He was "at work pretty much all the time in getting out lumber, or piling it up, or arranging it, and in operating saws."

Exceptions overruled.

EDWARD B. HOSMER & others vs. GEORGE I. HOITT.

Suffolk. January 11, 1893. — March 28, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

*Rule of Superior Court — General Order of Court — Entry of Default —
Filing of Suggestion of Insolvency — Motion for Continuance pending —
"Ripe for Judgment."*

Under the 27th Rule of the Superior Court, providing that "on the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court," and a general order adopted thereunder "that judgment be entered on the first Monday of every month . . . in all actions pending in said court which are ripe for judgment," a case in which a suggestion of insolvency has been duly filed by the defendant with a motion for continuance, and a default has been entered for his non-appearance when the case was reached for trial, is not "ripe for judgment," if the motion for a continuance has not in fact been considered and passed upon by the court.

MOTION to strike off a default and continue a case in the Superior Court. Hearing before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

The action was one of contract, in which the writ was dated December 24, 1891, and was returnable to the Superior Court on the first Monday of February, 1892. On March 4 following, an affidavit of no defence was filed on behalf of the plaintiffs, and, no counter affidavit being filed, on motion made on April 11, 1892, the case was advanced for speedy trial, and was put upon the trial list. While the case was so upon the trial list, the defendant's attorney caused to be filed in the clerk's office of the Superior Court a suggestion of insolvency, and motion for continuance in the ordinary form. On April 22 following, the motion not having been called to the attention of the court, the defendant was defaulted. Nothing was done thereafter in the case until May 14, 1892, when the defendant filed a motion that the default be stricken off and the case continued to await the proceedings in insolvency then pending.

Rule 27 of the Superior Court is as follows: "On the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court; and the court, or any justice, may at other times order judgment to be entered in any action."

Under this rule, on January 17, 1887, a general order of the court was adopted as follows: "Ordered, that judgment be entered on the first Monday of every month, and on the next day thereafter whenever said Monday is a legal holiday, in all actions pending in said court which are ripe for judgment, unless the party entitled thereto otherwise requests in writing."

The plaintiffs never requested in writing, or otherwise, that judgment should not be entered in their favor.

It has not been the custom of the clerk of the Superior Court, under this rule and order, to make any entries of judgment upon his docket upon the first Monday of each month, either in particular cases or by a general entry, but it has been his custom under that rule and order, without any further order of the court, to enter up judgment as of the first Monday of each month in all cases defaulted during the preceding month. No entry of judgment upon the default in this case had been made upon the clerk's docket when the defendant's motion to remove the default was filed.

The plaintiffs contended that, under the rule and the general or-

der of the court above set forth, the case had gone to judgment in its course on the first Monday of May, although no docket entry to that effect had been entered upon the records of the court, and that, having gone to judgment before the filing of the defendant's motion to remove the default, the court had no power or jurisdiction to direct the clerk to strike off the default; and requested the judge so to rule. The judge declined to rule as requested, and ruled that the case had not gone to judgment under Rule 27 and the general order of the court; and ordered the default stricken off and the case continued. The plaintiffs alleged exceptions.

S. L. Whipple, for the plaintiffs.

G. M. Hobbs, for the defendant.

BARKER, J. There has been no actual entry of judgment, either on the docket or in the extended records of the court. If the case went to judgment, it did so merely by force of the general order, "that judgment be entered on the first Monday of every month, and on the next day thereafter whenever said Monday is a legal holiday, in all actions . . . which are ripe for judgment, unless the party entitled thereto otherwise requests in writing." But the case was not "ripe for judgment," and so not within the terms of the order. The defendant was defaulted when the case was reached for trial; but the default was entered as of course, and without passing upon the defendant's motion for a continuance, then on the files of the court, and based upon the suggestion of his insolvency, also on file in the ordinary form, with a certificate of the Insolvency Court that proceedings were pending in that court.

It is still the settled practice, upon the suggestion of the insolvency of a defendant, to give him a proper opportunity to procure and plead his discharge in insolvency, (*Barker v. Haskell*, 9 Cush. 218, 222,) and a cause in which a suggestion of insolvency has been duly filed with a motion for continuance, and in which a default has been entered for the defendant's non-appearance when the cause is reached for trial, is not ripe for judgment either under the general order, or under Rule 27 of the Superior Court, if the motion for a continuance has not in fact been considered and passed upon by the court.

Exceptions overruled.

JAMES D. BUZZELL vs. SAMUEL M. EMERTON.

Middlesex. January 12, 1894. — March 28, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

False Arrest — Waiver — Estoppel — Defective Writ — Damages — Exceptions.

A person who was arrested upon a defective writ was taken by the officer, at his own request, to the office of a lawyer with whom he consulted, and then to the residence of one magistrate for the purpose of giving bail, and to the residence of another magistrate, where he gave bail, and he also paid for drafting the bail bond and for half of the carriage hire. When the writ was entered he appeared, filed an answer making no objection to the service, placed the case upon the trial list, and consented to dispose of it by an entry of "Neither party." *Held*, in an action against the officer for false arrest, that the above facts would not justify a finding that the plaintiff waived the illegal arrest, or had estopped himself from maintaining an action for damages.

An arrest upon a writ which contains no *capias* clause is illegal; and the officer in making the arrest is a trespasser, and is liable in damages to the arrested person.

In an action against an officer for false arrest, it appeared that the plaintiff, by agreement with the officer, was taken on the evening of his arrest to the residence of a magistrate, where he gave bail and was discharged. A bill of exceptions alleged at the trial did not show that the defendant asked for instructions as to the measure of the damages which the plaintiff might recover; nor that any instruction upon that subject was given, except the general one that the plaintiff was "entitled to recover damages which he sustained in consequence of what the defendant wrongfully did." *Held*, that there was no error in this instruction; and that it was not open for the defendant to complain that no specific instruction was given upon the question whether the plaintiff could recover damages for what occurred between the time when he agreed to give bail and his actual discharge.

TORT, for false arrest. The defendant justified in his answer as a constable in the service of due process of law. Trial in the Superior Court, before Bond, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced evidence tending to show that the defendant came to the plaintiff's house in Everett at about 9.30 o'clock in the evening of June 30, 1891, and arrested the plaintiff, alleging that he did so under a writ in favor of Frank M. Adams against the plaintiff, dated June 30, 1891, returnable to the First District Court of Eastern Middlesex; that the plaintiff asked the defendant what he was arresting him for, to which the

defendant replied that it was because the plaintiff was going to leave the State; that the plaintiff told the defendant that he had said that when he got his affairs settled up he was going to move, but was not going to leave the State, and asked the defendant to wait until morning before arresting him, which the defendant declined to do; and that thereupon the defendant took the plaintiff, at the latter's request, to the office of D. P. Bailey, a lawyer residing and having an office in Everett, that the plaintiff might consult with him as to what he should do.

The defendant testified that Mr. Bailey took the writ and declaration upon which the arrest was made into his hands and looked them over; and, on cross-examination, testified that he, the defendant, did not read the papers to Mr. Bailey, and did not know how much Mr. Bailey read them, and did not know whether his attention was called to the form of them or not; that the plaintiff had a private consultation with Mr. Bailey, who finally advised the plaintiff that he had better give a bond to release himself from arrest; that the defendant had a talk with Mr. Bailey, in which he asked Mr. Bailey if it would be right and proper for the plaintiff to give a bond; and that Mr. Bailey said that he did not see anything against it.

The plaintiff testified that the defendant did not show to Mr. Bailey the writ on which the arrest was made. The writ, which was introduced in evidence, did not contain a *capias* clause. Annexed to the writ were the affidavit of the attorney for Adams that he believed that the present plaintiff intended to leave the State, and the certificate of a magistrate authorizing his arrest after sunset.

The evidence also showed that the defendant took the plaintiff, with one Greenwood, who had consented to become the plaintiff's surety, and drove with them to the residence of the justice of the district court in Malden, for the purpose of having a bail bond approved; that when they arrived at his residence they found that he was not at home; that the plaintiff then asked the defendant what he could do, to which the defendant replied that they could go before the associate justice of the district court in Medford, but that the plaintiff would have to pay one half the expense, and that the plaintiff then said to the defendant that he would rather do anything than to be locked

up; that thereupon the defendant drove with the plaintiff and Greenwood to the residence of the associate justice in Medford, where a bail bond was drawn up, executed, and approved; that, at the defendant's request, the plaintiff paid for drawing the bond and for one half of the carriage hire, procuring the money from Greenwood for that purpose; and that they then drove back to Everett, and the plaintiff reached his home about two o'clock in the morning.

The plaintiff testified, upon cross-examination, that he was first informed of any defect existing in the writ upon which he was arrested by another attorney, Mr. Clark, a few days after the arrest was made; and that thereafter he left the case wholly to Mr. Clark.

There was evidence tending to show that Mr. Clark entered a general appearance for the defendant in the case in which the plaintiff was arrested, filed an answer, and made no objection in that court to the service of the writ, and placed the case upon the trial list; and that he, and also the attorney for the plaintiff in that case, were both in court when the case was called for trial, and made no objection to an entry of "Neither party," which was then made in the case by order of the court.

The defendant requested the judge to give the following rulings:

"1. There is evidence in the case on which the jury may find that the plaintiff waived any defect in the process on which he was arrested.

"2. If the jury believe that the plaintiff's attorney knew of any defect in the writ before the return thereof, and thereafter entered a general appearance for the defendant, filed an answer, and consented to the entry of 'Neither party,' without calling to the attention of the court said defect, or making any objection to the same or the service thereof, intending to get said case so disposed of as to make it impossible for the plaintiff in that case to amend the same, it would be evidence on which they might find a waiver by the plaintiff of the defect in said writ or the service thereof, and that he is estopped against maintaining this suit.

"3. It was open to the plaintiff, in the suit against him in the lower court, after entry and before the final disposition of

the same, by permission of the court, to amend the writ and insert therein a *capias* clause, and such amendment would have made said writ a justification to the defendant in this action for his proceedings thereunder."

The judge declined to give the rulings requested, and ruled that the process under which the defendant acted at that time was defective, and did not justify him in making an arrest of the plaintiff; that it was not a justification for him in this action for making that arrest; and that he was a trespasser with reference to what he did, and the plaintiff was entitled to recover damages which he sustained in consequence of what the defendant wrongfully did.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. R. Bigelow, (*G. A. Saltmarsh* with him,) for the defendant.
C. W. Clark, for the plaintiff, was not called upon.

BARKER, J. 1. The evidence tended to show that the plaintiff upon his arrest was, at his own request, taken to the office of a lawyer with whom he consulted, and then to the residence of one magistrate for the purpose of giving bail, and to the residence of another, where he did give bail, and that he paid for drafting the bail bond and for half of the carriage hire; and also that when the writ on which he had been arrested was entered he appeared, filed an answer making no objection to the service, placed the case upon the trial list, and consented to dispose of it by an entry of "Neither party," with the intention, as the defendant contends, of making an amendment of the writ impossible.

None of these things would justify a finding that the plaintiff waived the illegal arrest, or had estopped himself from maintaining his action for damages. They tended in no way to mislead or prejudice the defendant. The giving of the bail bond was not a waiver of the illegal arrest. *Carleton v. Akron Sewer Pipe Co.* 129 Mass. 40, 43. *Lane v. Holman*, 145 Mass. 221. The visits to the office of the lawyer and to the houses of the magistrates were after the arrest, and were incidents of the attempt to procure bail. They were not consented to by the defendant upon any suggestion or understanding that he should release the plaintiff, and the plaintiff was not released, but gave

bail. The court to which the writ was returnable could not by a subsequent amendment give validity to the arrest; *Learnard v. Bailey*, 111 Mass. 160; nor could the plaintiff's acts in entering a general appearance curtail the power of the court to allow an amendment. The instructions requested by the defendant were therefore properly refused.

2. As the writ contained no *capias*, the arrest was illegal, and the court properly so instructed the jury. The defendant was a trespasser in making the arrest, and the plaintiff was entitled to recover damages. See *Learnard v. Bailey*, *ubi supra*.

3. The bill of exceptions does not show that the defendant asked for instructions as to the elements or measure of the damages which the plaintiff might recover; nor that any instruction upon that subject was given, except the general one that the plaintiff was "entitled to recover damages which he sustained in consequence of what the defendant wrongfully did." There was no error in law in this instruction. If, as the defendant now contends, the plaintiff could not recover damages for what occurred between the time when he agreed to procure bail and his actual discharge, it is not open for the defendant to complain that no specific instruction upon the point was given.

Exceptions overruled.

GEORGE W. HORNE vs. OLD COLONY RAILROAD COMPANY.

Suffolk. January 15, 16, 1894. — March 28, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Crossing Track in Front of approaching Train.

The plaintiff, a yard-master in the freight-yard of the defendant, and familiar with the yard, and with the speed and direction of trains accustomed to pass through it, for the purpose of giving orders to some workmen, attempted to cross the railroad tracks about six hundred feet in front of a rapidly approaching train which he saw, and in so doing caught his foot under some unboxed wires near the rails and a few inches above the surface of the ground which were a part of the mechanism of an interlocking signal system then in process of construction, and fell so close to the train that he received a shock by its passing him as well as was injured by the fall. The plaintiff was aware of the position of

the wires, which to his knowledge had been for nearly two weeks in the same position and condition, and the orders which he was about to give did not call for such haste that he could not have waited for the train to pass before crossing the tracks. *Held*, that the plaintiff voluntarily and needlessly incurred an obvious risk, and that he was not in the exercise of due care.

TORT, for personal injuries occasioned to the plaintiff on January 13, 1891, from a fall occasioned by catching his foot under unboxed wires strung at the side of the railroad tracks of the defendant.

Trial in the Superior Court, before *Sherman, J.*, who, at the close of the evidence for the plaintiff, ruled that the action could not be maintained, and ordered a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

G. R. Swasey & A. P. Worthen, for the plaintiff.

J. H. Benton, Jr., for the defendant.

BARKER, J. The plaintiff, having voluntarily and needlessly taken a great and obvious risk, of all the elements of which he was fully aware, when, there being no occasion for haste, he could consistently with his duty have eliminated the chief element of danger by waiting a moment, now contends that he was in the exercise of due care. He was employed in a freight-yard, discharging the duties of yard-master. He was perfectly familiar with the yard, and with the trains which were expected to pass through it, and he knew their speed and in what direction and upon what tracks they would pass. His duties required him to walk about in the yard and to cross the tracks, keeping himself out of the way of passing trains. The chief danger to which he was exposed in this employment was that of being hit by moving trains or cars, and in crossing the tracks he was liable to be tripped by unboxed wires near the rails and a few inches above the surface of the ground. It is of these wires that he especially complains, and the evidence tends to show that, when attempting to cross a track in front of a rapidly approaching train, he caught his foot under the wires and fell so near the train that he was shocked by its passing near him, as well as injured by his fall. The wires were part of the mechanism of an interlocking signal system then in process of erection and unfinished, and they had been to his knowledge in the same

position and condition for nearly two weeks. He was perfectly aware of the presence of the wires and of their position, and whatever danger they added to his work was not only obvious but familiar to him, as he testified that he had been over them all the time they had been there. In the yard were three tracks used for through traffic. On the morning when he fell he had occasion to cross these tracks, to give orders to some workmen, and he attempted to cross in front of an express train which he saw coming rapidly, not more than six hundred feet away. The orders he was about to give did not call for such haste that he could not take his own time to cross the tracks, and it was his duty to keep out of the way of the train. If he attempted to cross in front of it, he must do so quickly, or the train would strike him. Under such circumstances, due care required him to wait for the train to pass, and to attempt to cross in front of it was negligence, which plainly contributed to his injury, and which bars his action. *Exceptions overruled.*

JESSE O. BOULESTER vs. CHARLES W. PARSONS.

Norfolk. March 2, 1894. — March 28, 1894.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Bite of Dog — Contributory Negligence — Leading Horse behind Wagon.

The leading of a horse behind a wagon on a country road is not such contributory negligence as will preclude the owner from maintaining an action, under the Pub. Sts. c. 102, § 93, against the owner of a dog by whom the horse is bitten while being so led.

LATHROP, J. This is an action, under the Pub. Sts. c. 102, § 93, for the loss of a horse alleged to have been bitten by the defendant's dog, in consequence of which the horse died. There was evidence that the plaintiff's brother was driving an express wagon, drawn by a pair of horses, along a country road; that in the rear of this wagon, and attached to it by the reins, was another horse harnessed to a single wagon; and that the defendant's dog ran out and bit the horse attached to the single wagon.

The defendant contended that it was negligence on the part of the plaintiff to lead a horse harnessed in a wagon behind and attached to another wagon. The plaintiff thereupon requested the presiding judge to instruct the jury in substance as follows. A man has a right to lead a horse in the way and manner described, and the mere fact that he was so leading a horse is not such evidence of negligence as would preclude the plaintiff from recovering in this action for the bite of the dog. The judge refused so to rule, and submitted the question to the jury whether the method of travelling adopted was negligent, and was such as to induce an attack by the dog. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the refusal to rule as requested, and to the instructions given.

We are of opinion that the ruling requested should have been given in substance. While the doctrine of contributory negligence has been often said to apply to an action on the Pub. Sts. c. 102, § 93, and we have no doubt that it does apply where the plaintiff incites or provokes a dog, and it may be in other cases, it has no application to the case at bar. The leading of a horse behind a wagon was simply a condition, and not, in any just sense, a contributory cause of the injury.

In *White v. Lang*, 128 Mass. 598, a person unlawfully travelling on the Lord's day was bitten by a dog, and it was held that his so travelling was merely a condition, and did not prevent his maintaining an action under the statute.

To hold that the question whether leading a horse behind a wagon should be submitted to the jury as evidence of negligence on the part of the plaintiff in inducing an attack by a dog, would render it necessary to submit to the jury the question whether the color of the horse or of the wagon, or of the clothes of the driver, might not have induced an attack. The law does not pay this respect to the characteristics or prejudices of dogs. See *Denison v. Lincoln*, 131 Mass. 236.

Exceptions sustained.

J. J. Feely, for the plaintiff.

J. E. Cotter, for the defendant.

ARTEMAS RAYMOND vs. CHARLES H. HODGSON & another.

Norfolk. March 9, 1894. — March 28, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Bite of Dog — Due Care and Negligence — Law and Fact.

Where a person interferes with his dog and another dog who are fighting, and is bitten, he must, in an action brought under the Pub. Sts. c. 102, § 93, show that he was using due care, and it is a question for the jury whether the circumstances warranted his interference.

TORT, under the Pub. Sts. c. 102, § 93, to recover double the amount of damages alleged to have been sustained from the bite of a dog. At the trial in the Superior Court, before *Sherman, J.*, the jury returned a verdict for the defendants; and the plaintiff alleged exceptions, which appear in the opinion.

E. Greenhood, for the plaintiff.

R. H. O. Schulz, for the defendants, was not called upon.

LATHROP, J. This is an action under the Pub. Sts. c. 102, § 93. At the trial, it appeared that the plaintiff's dog and the defendants' dog became engaged in a fight, though whether it was on the street or on the plaintiff's premises was in dispute; and it was also in controversy which dog began the fight.

The plaintiff testified that his dog was making great outcries; that he rushed up to the dogs, looked for a collar on the defendants' dog, and, seeing none, seized the defendants' dog by the tail, and pulled it away from his dog; and that, as the dogs became separated, the defendants' dog bit his hand, which had hold of the tail.

The plaintiff requested the judge to rule that he was not obliged to satisfy the jury that he exercised due care, under the undisputed circumstances of the case. The judge refused so to rule. The jury returned a verdict for the defendants, on the ground of want of due care on the part of the plaintiff; and the case comes before us on the plaintiff's exceptions to the refusal to rule as requested.

The plaintiff contends that the statute under which the action is brought is a penal statute; and that the rule which ordinarily

prevails in actions of tort does not apply. But in *Le Forest v. Tolman*, 117 Mass. 109, this statute was declared by Chief Justice Gray to be not a penal statute, but a remedial statute.

It has long been the recognized rule in this Commonwealth, in actions under the Pub. Sts. c. 102, § 93, and the similar preceding statutes, that the plaintiff, in order to entitle him to recover, must show that he was in the exercise of due care. Thus, in *Munn v. Reed*, 4 Allen, 431, it was said by Chief Justice Bigelow: "The purpose of the statute in affixing a heavy penalty in case of such injuries is to protect all persons, whatever may be their age or condition, who, through no fault of their own, are exposed to attacks from dogs." So, in *Plumley v. Birge*, 124 Mass. 57, it was said by Mr. Justice Morton: "It was necessary that the plaintiff, though a boy, should prove that he was in the exercise of due care." And in *Hathaway v. Tinkham*, 148 Mass. 85, 88, it was said by Mr. Justice Allen: "It is, however, essential to a plaintiff's right to recover, that he should have been in the exercise of ordinary care himself."

In *Matteson v. Strong*, 159 Mass. 497, a case very like the one before us, where the plaintiff was bitten while endeavoring to stop a dog fight, the question of his due care was, under the circumstances, held to be for the jury.

It is true that in each of these cases the plaintiff recovered a verdict, and the case might have been decided on the ground that the defendant was not injured by the ruling given. In all of them, however, the issue of the plaintiff's due care was recognized as a material issue, and was discussed by the court.

We have no doubt that where the plaintiff incites or interferes with a dog, and is bitten, his due care must be shown; and that the same is true where he interferes with two dogs that are fighting. How far the circumstances may warrant his interference will be for the jury to say.

Whether the rule of contributory negligence should be applied in other cases need not now be decided. The facts may show that the alleged negligence does not contribute to the injury, but is merely a condition. See *Boulester v. Parsons*, *ante*, 182.

In the case at bar, the plaintiff voluntarily submitted himself to danger; and we have no doubt that the ruling of the court below was right.

Exceptions overruled.

COMMONWEALTH vs. MICHAEL J. EARLY.

Middlesex. March 2, 1894. — March 28, 1894.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Illegal Keeping — Common Nuisance — Sale — Evidence — Distinct Offences in one Count — Formal Defect — Appeal.

On the trial of three complaints for the illegal keeping of intoxicating liquors, for keeping and maintaining a common nuisance consisting of a building used for the illegal sale and illegal keeping of intoxicating liquors, and for an unlawful sale of intoxicating liquors, the defendant, in order to meet the evidence of the government tending to show his proprietorship of the premises in question, put in evidence a lease of the premises from the owner to a third person dated a few days before the date of the alleged offences, and testified that he gave up the premises to such new lessee. The government, for the purpose of showing that the lease was not given in good faith, and that the place was not given up by the defendant to the new lessee, asked him, on cross-examination, whether on the day the lease was executed he did not state to a certain person that he wanted to have a certain case then pending against him settled, as he had a lot of farming to do, wanted to plant five acres of potatoes, and wanted to be at liberty to do so, and, on his replying in the negative, called in rebuttal the person named in the question to the defendant, who testified that the defendant made such a statement to him. *Held*, that the question to the defendant and the evidence of the witness were competent.

A complaint alleging that on a day named the defendant "did sell intoxicating liquor, to wit, lager beer, to certain persons whose names are unknown" to the complainant, does not charge a sale to several persons, but charges several sales to several persons, and combines distinct offences in one count; and as the defect is a formal one, no advantage can be taken of it for the first time in the Superior Court on appeal.

LATHROP, J. These are three complaints. The first for keeping, on May 21, 1893, intoxicating liquors with intent unlawfully to sell the same in this Commonwealth; and the second for keeping and maintaining, on May 3, 1893, and on divers other days and times between that day and May 22, 1893, a certain common nuisance, to wit, certain buildings named, used for the illegal sale and illegal keeping of intoxicating liquors. The third complaint charges that the defendant, on May 21, 1893, at a place named, "did sell intoxicating liquor, to wit, lager beer, to certain persons whose names are unknown to said complainant." The cases were tried together in the Superior Court, where the defendant alleged numerous excep-

tions, which appear in the bill before us. The case has been submitted to us on briefs.

The defendant in his brief has contented himself with merely stating what some of the exceptions are, but has set forth no reason why these exceptions should be sustained, and has referred to no authorities in support of them. We treat these exceptions as waived.

The exceptions which are argued remain to be considered.

The principal question at the trial was whether the defendant was the proprietor of the place referred to in the complaints. The government introduced testimony tending to prove that he was such proprietor. The defendant put in evidence a lease of the place from the owner thereof to a third person, dated May 1, 1893, and testified that he gave up the place to him. There was evidence tending to show that this lease was not given in good faith, but was intended as a mere form, to be used in case a complaint should be made against the defendant.

In this state of the evidence the defendant was asked by the government, on cross-examination, if on May 1 he did not have a conversation with a certain person named, in which he said that he wanted to have a certain case then pending against him settled, as he had a lot of farming to do, wanted to plant five acres of potatoes, and wanted to be at liberty to do so. This question was objected to, but the objection was overruled. The defendant answered that he remembered no such conversation. In rebuttal, the government was allowed to call the person named in the question to the defendant, and he was allowed to testify that he had such a conversation. The defendant excepted to the question put to him, and to the admission of the testimony of the witness.

Under instructions given by the presiding judge, the jury must have found that the five acres referred to were included in the lease above mentioned, if they took the evidence of the conversation into consideration, and that the conversation took place after the lease was made. The object of the question to the defendant and to the government witness was to show statements on the part of the defendant inconsistent with the defence that the lease was a valid one, and that the place was given up to the lessee. For this purpose the evidence was clearly

competent, and it was so limited in the instructions. *Commonwealth v. Dearborn*, 109 Mass. 368.

The remaining exception relates to the third complaint. The defendant asked the judge to rule that there was no evidence that a sale was made to persons unknown. The judge refused so to rule, and instructed the jury that, if they were satisfied that the defendant made a sale of intoxicating liquor to one person whose name was unknown, the allegation of the complaint was sustained; and that it was not necessary to show one sale made to two or more persons.

We are of opinion that the complaint does not charge a sale to several persons, but charges several sales to several persons; and thus combines in one count distinct offences. This was a formal defect which could not be taken advantage of for the first time in the Superior Court on appeal. Pub. Sts. c. 214, § 25. *Commonwealth v. Wolcott*, 110 Mass. 67. See also *Simpson v. Commonwealth*, 111 Mass. 417, 419.

Exceptions overruled.

F. P. Curran, for the defendant.

G. A. Sanderson, Assistant District Attorney, for the Commonwealth.

DAVID M. LITTLE & another vs. JOHN M. LITTLE & others,
executors.

Suffolk. March 20, 21, 1894. — March 28, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Question of Executors' Compensation rendered Immaterial — Special Compensation of Trustee — Agreement among Beneficiaries — Executors acting as Trustees — Ratification — Capital and Income — Repairs and Improvements — Error of Accounting.

The contention that executors are not entitled to compensation for the sale of real estate does not arise if the commission charged was, with other commissions, disallowed in the Probate Court, and a lump sum was allowed for their services, and the allowance was affirmed by a single justice of this court, no reason being shown why the sum so allowed was not a fair and reasonable compensation.

A will which contemplated the keeping of nearly the whole principal in the hands of trustees for a long period provided that one of the trustees, who had had the full management of the estate for some years in the testator's lifetime as his agent under salary, should continue such management, receiving compensation independent of the trustees' commissions at the same rate as his former salary. After the probate of the will an agreement by which this salary was reduced was made by all parties, two of whom afterwards contended that the payments of compensation on this account should be disallowed, because not justified by the will before the trustees were appointed by the Probate Court. *Held*, that it was the intention both of the testator and the parties to the agreement that there should be no interruption in the services to be rendered, and that the decree allowing the charges for this compensation was right.

The same persons were named by a will as executors and trustees, and all the property, real and personal, was devised to them. Without objection they qualified as executors only, and proceeded in the management of the estate as a whole, without objection or protest, distributing the income from time to time among the beneficiaries. Expenditures by them upon the real estate, in the nature partly of permanent improvements, and partly of repairs, were found to be wise, judicious, and necessary. So far as the expense of these charges was defrayed with the capital, two of the beneficiaries contended that they ought not to be allowed, because the executors had not been appointed trustees by the court. *Held*, that, although it would have been more regular for them to have qualified as trustees in the first instance, they were the persons to whom the property both real and personal was given by the will, and who had a right as trustees to make the expenditures; and that the objection was fully answered by the fact that since becoming trustees they had in that capacity adopted and ratified their acts as executors.

Where real property is left in trust to pay the income to one class, and the principal eventually to another class, the general rule is that repairs come out of income and substantial improvements out of capital, and there is no distinction that a line should be drawn at the death of the testator so that repairs then needed should be called improvements; and if it is impossible for the executors acting as trustees to separate by items the amounts chargeable to reconstruction and the amounts chargeable to repairs, because the repairing was done in the course of reconstruction and by the same men at the same time, an apportionment by the executors of the expense of the work according to their best judgment, charging to income the expense of so much of the work as they considered repairs, and to capital so much of the work as they considered reconstruction, will not be disturbed by this court.

A testator gave his entire estate to trustees to pay over the net income to his six children, two of whom were two of the three executors and trustees. The first two accounts were allowed by the Probate Court without objection, after the publication of citations, and the third was assented to by four of the six beneficiaries, two of whom were executors and trustees, and objected to by two beneficiaries who are the appellants and contestants. The accounts were corrected by crediting to income and charging to capital a certain sum, and the contestants not only claimed two sixths of that sum, but contended that the remaining four sixths should be held by the trustees, so that the contestants would get two sixths of the income of it, the other four beneficiaries being entitled to no part of it, as they had assented to the accounts. *Held*, that the contention was untenable, as the error was not one of administration but of accounting.

APPEAL, by Grace A. Oliver and David M. Little, two of the children and legatees under the will of James L. Little, from a decree of the Probate Court allowing the third and final account of the executors of said will.

Hearing before *Knowlton, J.*, who confirmed the decree of the Probate Court, and reported the case, at the request of the appellants, for the determination of the full court, in substance as follows.

James L. Little died on June 19, 1889, leaving six children and an estate of about \$2,500,000, invested about one half in real estate and one half in personal property, all of which after the payment of debts, which amounted to about \$30,000, and defraying the cost of a monument, he gave to trustees to pay over the net income in equal shares to his six children. He appointed two of his sons, John M. Little and James M. Little, and James H. Beal, his executors and trustees, and they were appointed and qualified as executors on July 29, 1889, when the will was admitted to probate, but did not qualify as trustees until February 29, 1892. As executors they filed three accounts, the first covering the period from July 31, 1889, to July 1, 1890, the second the period from July 1, 1890, to July 1, 1891, and the third from July 1, 1891, to April 1, 1892. The first two accounts were allowed by the Probate Court without objection, after the publication of citations, and the third, which was assented to by all the beneficiaries except the appellants, was referred to Hon. John Lowell as auditor, it being agreed that the reference brought before him the first and second accounts so far as they could properly be opened to correct mistakes or errors therein.

The questions raised were as follows : —

1. The contestants contended that a commission of two and one half per cent on the price for which the testator's dwelling-house, No. 2 Commonwealth Avenue, Boston, was sold, should be disallowed.

The executors in their account charged a commission of two and one half per cent on the capital of the personal estate, including therein the proceeds of the sale of this dwelling-house. This sale was not made to pay debts or legacies, the debts being less than \$30,000. The executors paid a commission of one per cent on the price to a broker for negotiating the sale. The

Probate Court disallowed the commission charging a percentage on the capital, and allowed in lieu thereof \$24,000, the decree reciting that the "auditor's report be confirmed with the exception that in view of the yearly charges for clerk hire, office rent, etc. allowed in the first and second accounts, and asked for and allowed in this the third and final account, and taking into consideration all the circumstances of the case, it is further decreed that of the item for executors' fees of thirty-four thousand five hundred eighty-seven and $\frac{3}{10}$ dollars there be allowed only the sum of twenty-four thousand dollars, the same being a just and reasonable compensation for services of said executors." The only objection to the decree of the Probate Court allowing commissions was that there was included in the commission an allowance of two and one half per cent on the proceeds of this house. The presiding justice held that the allowance of compensation made by the Probate Court rendered this objection immaterial.

2. The contestants objected to the payments of salary to John M. Little, one of the executors, at \$7,000 a year, from the death of the testator to February 29, 1892, when the trustees were qualified, \$19,250, and contended that this charge to income should be disallowed.

The will contained this clause: "Inasmuch as my son John M. Little has for years had the charge and management of my property as my agent, I direct that he shall continue to have the active charge and management of the same, my real estate especially requiring constant care and supervision, and that he receive for such services compensation at the same rate as he shall have been receiving at the time of my death, this to be independent of the commissions to which my trustees are entitled."

The compensation which he was receiving at the time of the testator's death was \$12,000.

Two days after the probate of the will, the children of the testator made an agreement by which, after reciting the above written provision of the will, John M. Little agreed to take and the others agreed that he should receive \$7,000 a year as compensation for the active care and management of the property, subject to the control and supervision of the trustees, in addition to the commissions to which the trustees should be entitled, and

it was stipulated that in all accounts of the executors and trustees this amount should be allowed.

The auditor's report recited: "From the words, common to the will and the contract, that this compensation should be in addition to the commissions of the trustees, the contestants argue that John M. Little must qualify as trustee before he should draw any salary. He has had the active care and management of the property since the death of his father, and this is an executors' account, so that he is within the terms of the contract. He is also within its true meaning. Neither the will nor the contract makes Mr. Little's compensation to be dependent on his accepting the office of either executor or trustee; but the plain meaning is, that, if he shall continue to act as agent after the death of the testator, he shall have the stipulated compensation."

3. The executors qualified on July 29, 1889, and entered into possession of the whole estate, real as well as personal, not being appointed or qualifying as trustees until February 29, 1892, when they were ready to close their accounts as executors. Their petition for trusteeship was dated February 20, 1892. They kept but one set of books, in which they included the income and expenses of the real estate as well as of the personal property, and all the expenditures on the real estate. During the period of their executorship they expended a considerable amount of money in repairs and improvements of the real estate, charging improvements to capital, and repairs to income, in their accounts.

The executors charged themselves in their three accounts, not only with the personal estate and its income, but also with the income of the real estate, and credited themselves with the expenditures upon the real estate incurred in repairing, running, and improving it. In the third account they credited themselves with the balance of the personal estate as paid over to themselves as trustees. At the hearing before the auditor on the third account, the contestants for the first time objected to the executors including in the accounts the amount of money paid by them and charged to capital for improvements. It appeared that the contestants knew that the executors were receiving the rents of the real estate, and no objection was made to the payment by the executors of the running expenses of the real

estate, or of ordinary repairs, or of the net rents to the beneficiaries. David M. Little, one of the contestants, was absent in Europe from October, 1889, to October, 1891. There was no evidence whether or not either of the contestants had actual knowledge that when these expenditures for improvements were being made the executors had not qualified and been appointed trustees, or whether or not either of them had actual knowledge, before the third account was brought to them for approval, that they had charged these expenditures in their accounts as executors. Neither of them appeared as a witness or was requested to appear. Before this account was filed, it was submitted to the contestants and explained to them by John M. Little, and neither of them objected to these expenditures being included. There was no evidence to show that either of the contestants had any experience in the making up of probate accounts, or knowledge whether said charges were properly included in this account or not.

The details and facts concerning these expenditures were testified to at great length before the auditor, and the contestants contended that the wisdom or judiciousness of the improvements could not be inquired into in the hearing on the executors' accounts because the expense of them was not properly chargeable in said accounts; but the presiding justice ruled otherwise, and found on the evidence that the improvements were wise and judicious, and had increased the net rental of the property, of which the beneficiaries had had the benefit. This action of the executors, and their method of keeping the accounts, had been approved by the accountants acting as trustees. The only objection made by the contestants to the charges was that the executors had no right to make the improvements. The presiding justice ruled that the including of these expenditures in these accounts was justifiable under the circumstances. If this ruling was erroneous, the accounts were to be altered by crediting the amounts standing in the accounts as charged to capital for additions to the real estate, as paid to the respondents in anticipation of their appointment and qualification as trustees, and were to be accounted for by them by similar entries in their accounts, subject to the right of the contestants to object to the wisdom and judiciousness of the expenditures.

4. Capital and income. The auditor's report recited: "In the course of repairing and renovating the several tenements and buildings, large expenses were incurred. They were entered in the first instance in the books of account against income, and at the end of each year, when the accounts were made up, a division was made between capital and income, as the trustees considered proper and just. The contestants have examined John M. Little fully upon these items, which are numerous, and have made up a schedule showing how they consider that each item should be charged, whether to capital or to income. Their view of the law is, that in a case of this kind, where a large property is left in trust to pay the income to one class, and the principal eventually to another class, equitable tenants for life are entitled to have the real estate left by the testator put into good repair, so as to be let to the best advantage, at the expense of the capital, and in that view they object to any of the repairs being charged to income, except what may be called current expenses after all repairs and renovations had once been made. I consider the law to be otherwise. While there may be no invariable rule upon the subject, the general principle is that repairs are to be made from income; and I have not seen the distinction taken that a line should be drawn at the death of the testator, so that repairs then needed should be called improvements. Where the gross rents, as in this case, are above \$100,000 a year, I am of opinion that repairs, though they may have been needed at and before the testator's death, are properly chargeable to the income, which is certainly benefited by keeping the buildings in good order, while the benefit to the inheritance is contingent and problematical. A life tenant takes the property as he finds it. If he wants repairs he makes them. He cannot require the remaindermen to do any part of them. That the property is in trust makes no difference in the rights of the parties, though the trustees may have the right to make repairs and improvements if no one objects. The law of Massachusetts permits the capital to be employed in substantial alterations and improvements if the inheritance appears to be benefited to the extent of the outlay. If it were possible to ascertain how much in dollars and cents each class is benefited by what has been done, it would be easy to decide these matters. In the absence of such even

approximate estimate, the rough and ready rule that repairs come out of income, and substantial improvements out of capital, furnishes as good a method as any I know. The simplest instances in which the foregoing question arises are the house 122 Marlborough Street, Boston, and the Evans House. The Marlborough Street house was let for ten years, of which eight had run at the death of the testator. When the two years were out, the trustees properly expended, in papering, painting, and entire replumbing, \$2,972.29. These were clearly repairs, and, on my theory of the law, are rightly charged to income. In the Evans House (first account) a new elevator was needed to replace an old one, and was put in in September, 1889, at a cost of \$1,240. In the second account there is charged for a new boiler needed to replace an old one, \$1,577.61. These charges are properly made to income. The other cases are more complicated.

“Eliot and La Grange Streets. This property was bought at two different times, the two together forming a property extending through from one street to the other. The Eliot Street property was let for business, and the La Grange for boarding-houses. There were two old houses of no great value in the yard between the principal buildings. The alterations on Eliot Street were planned in the lifetime of the testator, and consisted of demolishing the two houses in the yard and extending the stores. Those on La Grange Street consisted of changing the lower stories into stores. The total cost of both was \$11,886.46. Of this sum there was charged to capital in the first account \$8,346.16, which is not objected to. Nothing was in this account charged to income. In the second account there was charged to capital \$1,653.84. In the second account, to income \$1,886.46, which it is contended should be charged to capital. The increase of rent warranted the expense. The charge to income appears to have been made on the estimate that it must have cost at least that sum to repair the house on La Grange Street for the uses to which it had before been put; and that the increase of permanent value, as shown by the city's assessment, was \$10,000. The charge to income is exactly the excess of cost above \$10,000. It will be seen that this apportionment is somewhat conventional. If such a mode of

division is admissible, I find that the income, which was much increased, was not charged too large a part of the cost.

"Hotel Pelham. Great changes and renovations were necessary in this large building. The total cost was, in round numbers, \$46,000, of which was charged to income \$30,000, and to capital \$16,000. The circumstances of the case and the mode of division between capital and income is thus described by Beal, one of the trustees: 'The Pelham when we took it was an apartment house. . . . The position changed and ceased to be a desirable place of residence, and we began to have applications for offices. In order to meet those applications we had to refit the offices and change about. . . . In fact it had to be changed over, and we have been engaged in changing it over now for the last two or three years. . . . The heirs naturally wanted to get all the income they could get. I, on the other side, felt that I was called upon to keep that perfectly intact, to protect it, and not permit its being stripped. . . . To separate the absolutely necessary repairs to keep the building in shape from the changes which were being made to put it in condition, became a matter almost of judgment, and my feeling has been all along to keep the property up to the state in which a careful master should keep it up. If we erred at all, we erred in charging too much to principal, and not enough to income.'

"Acting upon the theory that the renewal of what was worn out should be charged to income, though this renewal was made in the course of permanent improvements, the trustees divided the expense according to their best judgment, charging the former to income and the latter to principal.

"Swampscott estate. The whole amount spent on this property was about \$46,000, of which there was charged to capital about \$28,500, and to income about \$17,500. That is to say, the whole income for two years was taken for this purpose. Beal testified concerning this estate as follows: 'There is a great estate down there of over thirty acres; the very nature of the property requires a vast expenditure to keep it in order. The calls from the occupants are very numerous; . . . and the property itself was uncertain. Every spring we were in doubt whether we should get a tenant. Finally, a disposition of the property was made, cutting off a

part of the main house, putting it in condition for Arthur Little, who made us an offer . . . for five years, which we thought desirable. But to cut off a part of the main house, what should he do with it? Mr. John's mechanical ingenuity suggested we should take it as the basis of a new house near by, putting it between that and another house. That was done. Then the alteration of another house, called the Bates house, was done. Then still another house, and then stables had to be built. We had to charge capital with what we expended, and expected to get from that capital a small percentage in the development of the estate, which we have done, but if we had a larger income my advice and judgment would have been to charge income more rather than less, in order that we might keep the property as it should be.' He afterwards says that, excepting for some prospective value in the property, he should think the appraisement (\$120,000) too high, and should have doubted the expediency of these expenditures. That the rents will give but a small percentage on the amount charged to capital. John M. Little, while agreeing with Beal, as I understand, that too much has not been charged to income, actually made up the division by charging new construction to capital, and repairs and running expenses to income. This was done at the end of each year, and when, as he testified, his memory was clear as to the kind of work which each bill represented, that is, whether repairs or reconstruction.

"If it be true, as I think it is, that as much has been charged to capital as its increase in value will warrant, and that the expenses have been divided as accurately as possible between the two accounts, these remarks apply to both the properties Hotel Pelham and Swampscott; and I accordingly report that no errors are found in these two accounts."

The presiding justice's report was as follows:—

"No. 122 Marlborough Street, Boston, renting for \$1,700 a year, had been let to a tenant for ten years, and the lease expired in April, 1891. The house had then to be repaired from top to bottom. The plumbing, worn out and old-fashioned, that had been in use about twenty-six years, had to be entirely replaced at an expense of \$1,328 for the plumbing. The furnace, the range, and the plaster had to be repaired, and the house re-

papered throughout. There was no reconstruction. If the tenant had moved out two years earlier, there would probably have been a necessity for the bulk of these repairs. . . . There were also extensive repairs of buildings on the Swampscott estate. . . .

"I find on the testimony of said John M. Little that the permanent value of the Swampscott estate was not increased by all the expenditures on it for repairs and reconstruction beyond the amounts charged in the accounts to capital, and that the income from the estate was increased by said expenditures \$2,500 a year.

"Much the greater part of these repairs on the Swampscott estate was made necessary by the wear and tear of the years preceding the date of the testator's death, but exactly how much did not appear, nor did it appear on the evidence that it was possible to determine exactly what proportion of the work done was made necessary by the wear and tear of the years preceding the testator's death, and what was the result of the wear and tear of the time succeeding. Nothing nearer to a determination of this question would have been possible than an approximation by way of estimate, which would not have been nearly accurate. The expense of these repairs was charged to income in the executors' accounts. The contestants contended that these repairs and the repairs of 122 Marlborough Street were not chargeable to income, but I ruled that they were all chargeable to income. If this ruling was erroneous, such further proceedings are to be had as the court may direct.

"In reconstructing and repairing the buildings belonging to the estates upon Eliot and La Grange Streets and Hotel Pelham, it was impossible for the executors to separate by items the amounts which were chargeable to reconstruction and the amounts which were chargeable to repairs, because the repairing was done in the course of the reconstruction and was done by the same men at the same time. The executors made an apportionment of the expense of the work according to their best judgment, charging to income the expense of so much of the work as they considered repairs, and to capital so much of the work as they considered reconstruction. The work at the Hotel Pelham consisted of general repairs, and the work of converting apartments which had been let in suites to families into offices

for business purposes. This work began a year and ten months after the death of the testator. I found on the testimony of John M. Little that the permanent value of Hotel Pelham was not increased by the work by more than the amount charged in the accounts to capital on account of the work, and that the rental value was thereby increased \$2,350. The contestants contended that none of this work considered by the executors repairs was chargeable to income, but I ruled that such of the work as was repairs was all chargeable to income, and the apportioning of the work between repairs and reconstruction, and of the expense of it between income and capital, I found correct. If this ruling is erroneous, there shall be such further proceedings as the court shall direct. There is an error in the auditor's report in reference to Hotel Pelham. The total cost in round numbers is put at \$46,000. This should be \$32,000, and this amount was expended for lumber, carpenters' work, painters' work, and materials, for papering, plumbing, gas and steam fittings, glass, hardware, etc., charged in the third account. The amount charged to income is put at \$30,000, but should be \$16,000, as charged in the third account. The \$46,000 stated by the auditor included about \$14,000 charged in the third account for taxes, coal bills, gas, wages, and other running expenses of Hotel Pelham. The same kind of work of reconstruction and repair the respondents as trustees have been doing ever since the third account was filed, and the work is not yet finished. In the case of the buildings on Eliot and La Grange Streets, the total amount expended was \$11,886.46, of which \$10,000 was charged to capital and \$1,886.46 to income. This also was arrived at by an apportionment, the executors thinking that \$10,000 covered the actual value of the work done in reconstruction, although they could make no detailed statement by items of the amounts chargeable to repairs and to reconstruction. I found on the testimony of John M. Little that at least \$1,886.46 of this amount was, on a fair estimate, spent in actual repairs on the La Grange Street property, including putting into thorough repair to be used for residence the rooms over the stores into which the first stories of the two dwelling-houses on La Grange Street were turned, these stores being extended seventeen or twenty feet to the rear, and these repairs being done

simultaneously with and in the course of the other work which was begun in April, 1890. I also found from the same testimony that the addition to the permanent value of the Eliot and La Grange Street estates made by the entire work done on them apportioned between reconstruction and repairs was the amount charged to capital; that by this work the annual rental from the Eliot Street estate was increased \$2,000, and the annual rental of the La Grange Street estate was increased \$1,310, principally by reason of the greater rent that could be obtained for the stores. The whole of the work on the Eliot Street estate was charged to capital. Much the greater part of the repairs on the La Grange Street estate and the Hotel Pelham was made necessary by the wear and tear of the years preceding the testator's death, but exactly how much did not appear, nor did it appear on the evidence that it was possible to determine exactly what proportion of the work done was made necessary by the wear and tear of the years preceding the testator's death and what was the result of the time succeeding. Nothing nearer to a determination of this question would have been possible than an approximation by way of estimate, which would not have been nearly accurate. The contestants contended that the \$1,886.46 was not chargeable to income, but I ruled that it was. If the ruling is erroneous, the second account of the executors is to be modified accordingly."

The auditor found that the accounts should be corrected by crediting to income and charging to capital the sum of \$6,891.86, because of taxes and some other bills which in the first account had been charged to income instead of to capital. The third account was assented to by four of the six beneficiaries and objected to by two, the contestants. The last named not only claimed two sixths of the \$6,891.86, but contended that the remaining four sixths should be held by the trustees, so that the contestants would get two sixths of the income of it, the other four beneficiaries being entitled to no part of it, as they had assented to the accounts.

The presiding justice ruled that this objection of the contestants was not well taken.

E. W. Hutchins, (*H. Wheeler* with him,) for the appellees.

D. E. Ware, for the appellants.

BARKER, J. The appellees were named by the will executors and trustees, and until they were appointed as trustees by the Probate Court it was their duty as executors to administer the estate in accordance with law and the will of the testator. They are found to have acted with care and prudence, and the questions argued relate to their charges and expenses of administration, and to the question whether certain of their expenditures should be borne by the capital or the income of the estate.

1. The executors charged a commission upon the proceeds of a sale of a house and lot, and the appellants contend that the executors are not entitled to compensation for the sale of real estate. But the question does not arise, because the commission charged upon the sale was, with other commissions, disallowed in the Probate Court, and a lump sum was allowed to the executors for their services, which allowance was affirmed by the single justice of this court. No reason is shown why the sum so allowed was not a fair and reasonable compensation for the services in respect of which it was allowed.

2. The estate was comparatively a large one, composed of real and personal property in amounts nearly equal. The debts were inconsiderable, and the scheme of the will contemplated the keeping of substantially the whole principal in the hands of the appellees for a long period, although the income would be distributed quarterly. One of the appellees had the full management of the estate for some years in the testator's lifetime, as his agent under salary. The will provided that he should continue to have the charge and management of the property, and should continue to receive for such services compensation, independent of the trustees' commissions, at the same rate as his former salary. After the probate of the will, an agreement by which this salary was reduced was made by all parties, including the appellants. They now contend that the payments of compensation on this account should be disallowed, because not justified by the will before the trustees were appointed by the Probate Court. But it is evident that it was the intention both of the testator and of the parties to the agreement that there should be no interruption in the services to be rendered, and the decree of the Probate Court and of the single justice of this court allowing the charges for this compensation was right.

3. Some portions of the real estate were, at the death of the testator, out of repair, and so situated and of such character that good management required large expenditures upon them in the nature partly of permanent improvements and partly of repairs, by the making of which they were adapted for new uses, and were then leased. So far as the expense of these changes was defrayed with the capital of the estate, the appellants contend that the expenditures ought not to be allowed, because the appellees had not then been appointed trustees by the court. But the expenditures have been found to be wise and judicious, and it is plain from the facts stated that they were necessary, and to the advantage of the estate. The same persons were named by the will as executors and trustees, and all the property, real and personal, was devised to them, and the responsibility of management was upon them from the time of the probate of the will, by whatever official name they may have been designated. Without objection from any one, they qualified in the first instance as executors only, and they proceeded in the management of the estate as a whole, without objection or protest, distributing the income from time to time among the beneficiaries. Although it would have been more regular for them to have qualified as trustees, they were the persons to whom the property in their charge both real and personal was given by the will, and who had a right as trustees to make the expenditures. The objection urged is purely a technical one, and is fully answered by the fact that since they became trustees they have in that capacity adopted and ratified their acts as executors in the management of the real estate. Under the circumstances of this case, we are of opinion that the items of expenditures were properly included in their accounts as executors. See *Hull v. Cushing*, 9 Pick. 395; *Newcomb v. Williams*, 9 Met. 525, 534; *Miller v. Congdon*, 14 Gray, 114, 115.

4. The appellants contend that none of the expenses upon the real estate should be charged to income. But this is a question of detail, in the treatment of which no error not corrected by the Probate Court is shown, and the matter seems, after a very minute and careful investigation, to have been correctly dealt with in the accounts as allowed. The ruling that such of the work as was repairs was chargeable to income is plainly

correct, and the apportionment by the Probate Court of the expense between capital and income was, in our opinion, right.

5. The contention that the appellees and those beneficiaries who acquiesced in the allowance of the accounts as rendered should not have the benefit of the correction of the error in charging certain expenditures to income is untenable. The error was not one of administration, but of accounting. No harm finally resulted from it to the appellants, and to allow their contention would be to give them a benefit from the error which has been corrected upon their request, as well as from its correction, and to inflict without reason a forfeiture upon others.

Decree affirming the decree of the Probate Court affirmed.

JAMES KEANE vs. OLD COLONY RAILROAD COMPANY.

Middlesex. November 17, 1893. — March 29, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trespass — License to lay Track on Private Land — Revocation — Evidence of Acts after Action brought — Consent of Selectmen.

In an action for an alleged trespass in building a spur track of the defendant's railroad over a private way which was on the plaintiff's land, there was evidence tending to show an implied license by the plaintiff for the continuance of the track on his land for several years prior to action brought; but the existence of such license was in dispute. *Held*, that such license might be implied from facts which happened not only before action brought, but also, in the discretion of the presiding justice, from facts occurring afterward, as showing a purpose substantially continuous, though interrupted a short time by the single act of bringing the action. *Held also*, that evidence of the consent of the selectmen of the town in which the track was located to lay and operate the railroad over the private way and across a public street, which was probably introduced for the purpose of showing a right to cross the street, whether competent or not, became immaterial under the instructions of the judge that the plaintiff had shown that the track was on his land, and that this established his right to recover unless the defendant showed that the plaintiff licensed it to go upon his land, and to remain there.

TORT, for trespass alleged to have been committed by the defendant between August 1, 1884, and July 12, 1890, the date

of the writ. At the trial in the Superior Court, before *Hammond*, J., there was evidence tending to show that the plaintiff was the owner of a parcel of land in Marlborough, situated on Howe Street on the southerly side of a private way called Weed Street; that the land in the deed conveying it to the plaintiff was bounded northerly "by a street . . . called Weed Street"; that the railroad tracks of the defendant ran parallel with Howe Street about two hundred feet southwesterly therefrom; and that in 1881 the defendant built a spur track from the line of its location through Weed Street on the side adjoining the plaintiff's land, and across Howe Street to a building known as the Boyd Corey shop, over which it has since run its cars and locomotives. When the spur track was built, the plaintiff was living on his premises, and knew of its construction, but, while giving no express license or permission to its construction, he made no objection to it at the time.

On cross-examination the plaintiff, subject to his exception, testified that in May, 1887, he leased the rear portion of his lot to the Marlborough Granite Company for the purpose of carrying on the business of granite cutting, and that from that time until the autumn of the same year car-loads of granite were pushed up the track on Weed Street by the defendant at the request of the Marlborough Granite Company, and unloaded upon the leased premises, with the knowledge and without the objection of the plaintiff; and that at about the same time a car-load of lumber, which was to be used in altering a building upon his premises, was pushed up the track and unloaded on his land at the request of the contractor, but with the plaintiff's knowledge, and without objection on his part.

On further cross-examination, which was permitted by the judge for the purpose of showing the plaintiff's frame of mind and attitude prior to the date of the writ, and as bearing on the general question of his consent to the maintenance of the track, it appeared that in May, 1891, he moved a building on to his land, and placed it within three feet of Weed Street, and for a year prior to the trial he had rented it to one Wheeler as a cold-storage room for meat; that Wheeler received all his meat in cars, which were run upon the spur track and unloaded at the door, and that with the knowledge of the plaintiff, and without

his dissent, a platform had been built out from the house to the track, so that the meat might be more easily unloaded.

One Brigham, the station agent in Marlborough, a witness called by the defendant, testified that the plaintiff at one time complained to him that he was unable to get into his back yard with coal, and said that, if some planks were put down there it would accommodate him very much, and that the witness directed the section men to put down some planks, which the plaintiff had used ever since; that the plaintiff had at times asked him to move the cars from the back of his house, and that he had done so; and that the plaintiff at one time within five years before action brought had said he would like to have the track taken up, to which the witness had replied that he could not do it.

One Wheeler, a witness called by the defendant, testified that after the date of the writ, and for about a year prior to the trial, he had occupied the building which the plaintiff had moved on to his premises as a refrigerator storehouse, for which he had paid rent to the plaintiff, and that about twice every week while he was there he had had car-loads of beef pushed up the track, and unloaded at his door, and that he never knew of the plaintiff objecting to this: but that a short time before the trial he had acted for a beef-packing house in Chicago in negotiating with the plaintiff for the purchase of the building occupied by the witness, with the intention of using it for the purposes of a refrigerator storehouse, and that during the negotiations the plaintiff had stated that the track on Weed Street would be a benefit to such purchasers, and had never told him that he objected to its existence, or that he had an action about it pending.

The judge stated to the jury that he should allow the defendant to show the plaintiff's attitude with reference to the track since the action was brought, so far as it tended to throw any light on his frame of mind, saying that he should instruct the jury that, if the plaintiff was not willing to have the track there prior to the beginning of the action, the fact that he was afterward willing was immaterial; but that as he might have changed his mind, and as bearing on the question of whether the plaintiff had before consented, he should allow the defendant to show that the plaintiff made no objection within a reasonable time

afterward, and that he should instruct the jury that the plaintiff's consent after the bringing of the suit, if he had not consented before, was of no consequence. The defendant introduced in evidence an order of the selectmen of the town of Marlborough, giving their consent to the location of the track over the land of several persons and across Howe Street, subject to various conditions as to grading and paving.

The judge instructed the jury in substance as follows.

This railroad is located upon the plaintiff's side of the middle line of Weed Street, and is upon his land. That is conceded, and upon the rules which have been given in reference to the construction to be given to his deed he has shown beyond any kind of doubt that the railroad is upon his land. That establishes his right to recover against the defendant unless the defendant on its part shows that the plaintiff licensed and permitted it to go upon and stay upon his land, and to put its rails and run its engines there, and that is the main question in the case. The defendant must establish the proposition that permission was given by the plaintiff, or it fails to show its right to be there. The parties are agreed as to many things bearing upon that question. In the first place, it is agreed that the plaintiff never told the defendant that it might go on his land, though no evidence appears to show that he objected when the track was being constructed. The condition of his land, whether the track interfered with his rights, and to what extent, were known to him at the time. It is contended by the defendant that the plaintiff himself allowed his tenants to make use of the track during a part of the time in which he now complains that it was trespassing upon his land, and that he received the profits, if any, accruing from such use. On the part of the plaintiff it is said that he never consented, and that he never said or did anything which would authorize the railroad to think that he consented; that he has been protesting against it; that he went to the local agent of the defendant, and not only complained of the manner in which the cars were being loaded and unloaded, but because they were allowed to stand by the side of his premises; and that he asked not only that the defendant should remove the cars, but the tracks also. The counsel for the defendant referred to these circumstances as tending to show consent.

and the counsel for the plaintiff referred to them as tending to show a want of consent, and evidence has been introduced of acts complained of after the action was brought. This evidence has been admitted, not on the question whether he is now willing that the track should be there, or whether he has been willing at any time since the action was brought, but on the question whether during the time complained of he was willing; and this evidence as to his state of mind since he brought his action is important and material only so far as it tends to show what the state of his mind was during the time complained of. The real question is not whether he now consents, but whether during the whole or any part of the time of which he complains he consented or licensed the road to be there by his acts or by his conduct. To find a license it is not necessary to find that the plaintiff by any express language licensed the railroad; but if you find that by his acts and conduct he gave the defendant reason to believe that he was willing that the track should go there, and the defendant, so believing and relying upon his acts and conduct, placed the railroad upon his land, he cannot now complain of the act.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in November, 1898, and afterwards was submitted on the briefs to all the judges.

H. S. Ormsby, for the plaintiff.

C. F. Choate, Jr., for the defendant.

ALLEN, J. There was evidence tending to show an implied license by the plaintiff for the continuance of the railroad for several years prior to the date of the writ; but the existence of such license was in dispute. Such license might be implied from circumstances, and the plaintiff no longer disputes the competency of the evidence offered for that purpose of facts which happened before the date of the writ. *Merrick v. Plumley*, 99 Mass. 566. But he contends that such license was revocable, if it ever existed, and that the bringing of the action was a revocation, and that evidence of what took place afterwards was irrelevant and incompetent. Assuming that the bringing of the action was a complete interruption of any previous license, yet it is conceivable that the plaintiff might afterwards assent to the

operation of the railroad. If it could be shown by clear evidence that he did so assent, would that fact have any tendency to show that he also assented before the bringing of the action? We cannot say that such subsequent assent might not be considered by the jury. If it would be competent to show such subsequent assent by clear and explicit evidence, as, for example, by a written license without consideration, then the fact might also be shown by circumstantial evidence. The mode of proving it is not material. The fact of the interruption of the license by the bringing of the action would also be considered by the jury. Notwithstanding such interruption, we cannot say that it was outside of the discretionary power of the court to admit the evidence. *Morris v. French*, 106 Mass. 326. *Sherman v. Wilder*, 106 Mass. 537. *Thayer v. Thayer*, 101 Mass. 111, 114. *Lane v. Moore*, 151 Mass. 87, and cases cited. *Commonwealth v. Finnerty*, 148 Mass. 162. *Todd v. Rowley*, 8 Allen, 51. *Mayer v. People*, 80 N. Y. 364, 373-376. There might be a purpose substantially continuous, though interrupted for a short time by the single act of bringing the action.

The consent of the selectmen could of course give no authority to lay or operate the railroad over the private way, but was put in, we presume, in order to show a right to cross Howe Street. Whether strictly competent or not, it became immaterial, because the judge in the clearest and most explicit manner instructed the jury that the plaintiff had shown beyond any kind of doubt that the railroad was on his land, and that this established his right to recover unless the defendant showed that he licensed and permitted it to go there and stay there. There could be no mistaking the proposition that the defendant must fail in its defence unless it established that such permission was given by the plaintiff. We see no chance for any misapprehension on the part of the jury.

In the opinion of a majority of the court, the entry must be
Exceptions overruled.

LILLIE B. TITUS vs. CITY OF BOSTON & others.

Suffolk. December 8, 1893. — March 29, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Sewer — Eminent Domain — Absolute Fee — Damages for Increased Flow of Sewage.

The power given by St. 1885, c. 249, § 1, to the board of aldermen, to "take in fee for the city of Boston any land that they may deem necessary for" "the purposes of building and maintaining the system of sewers of said city, and discharging sewage therefrom," being a power to take the title in fee simple absolute to the land, a bill in equity cannot be maintained by a person a part of whose land was so taken to restrain the city of Boston and the Metropolitan Sewerage Commission from the performance of a contract by which the city agreed to take into its sewer constructed through the land taken from the plaintiff the sewage of other cities and towns connected with the Metropolitan Sewerage system, on the ground of a supposed possibility of reverter in the plaintiff in the land taken from him by the city, or on the further ground that his remaining land will be seriously injured by the proposed increased use of the city's sewer.

BILL IN EQUITY against the city of Boston and against Hosea Kingman, Tilly Haynes, and Harvey N. Collison, constituting the Board of Metropolitan Sewerage Commissioners, to restrain them from the performance of a contract by which the sewage of various cities and towns connected with the Metropolitan Sewerage system was to be discharged through the sewer of the defendant city, which was constructed through land taken from the plaintiff.

The bill alleged, in substance, that the plaintiff was, on November 5, 1889, the owner of land in Quincy in that part called Squantum, and known as Squantum Head, Moon Island, and Little Moon Island; that on or about that date the city of Boston, acting by its board of aldermen, under the authority of St. 1885, c. 249, took a portion of the land of the plaintiff for the building and maintenance of a system of sewers for the city and for the discharge of sewage therefrom; that thereafter the plaintiff filed a petition for the assessment of her damages caused by the taking, which petition is now pending in the Superior Court; that the defendant city entered upon the premises of the plaintiff and constructed various sewers,

reservoirs, and other structures necessary and proper for the purpose of maintaining its system of sewers, and for discharging therefrom the sewage of the city of Boston alone; that the city of Boston had no right, by the terms of the taking or by virtue of the statute authorizing the taking, to use or permit the use of the sewers for the discharge of the sewage of any other town or city than the city of Boston, or to contract with any person, corporation, or officials for the use of the sewers for any other purpose than the discharge of sewage of the city of Boston alone; that on April 27, 1892, the defendant city made a contract with the other defendants, constituting the Board of Metropolitan Sewerage Commissioners, by which the city undertook and agreed to take into its sewers which were laid through the land taken from the plaintiff, and to discharge therefrom at its Moon Island outlet, all the sewage caused by the commissioners to be discharged therein; that the Metropolitan Sewerage Commissioners have constructed a system of sewers for the disposal of the sewage of the cities of Waltham and Newton and the towns of Watertown and Brookline, and of other towns, all of which sewers the commissioners propose to connect with the sewers of the city of Boston, as provided in their contract, in such manner that the entire sewage of those cities and towns shall be discharged through the sewers laid through the land taken from the plaintiff; that the contract and the proposed action of the defendants are unauthorized by law, and by the taking of the land by the city of Boston, and that it will cause serious and irreparable injury to the plaintiff and to the remaining lands owned by her; and that no compensation has been paid or tendered to the plaintiff by the defendants for such use of her land, nor does she have any adequate remedy at law to obtain compensation for the damages caused by the proposed illegal acts.

The prayer of the bill was that the defendants might be enjoined from the performance of the contract, and from the use of the sewers and the outlet to Moon Island, and of any part of the land taken from the plaintiff, for the discharge of any sewage except that coming from the city of Boston alone.

The city of Boston filed an answer, and the Board of Metropolitan Sewerage Commissioners demurred for want of equity.

Hearing before *Allen, J.*, who sustained the demurrer, and ordered the bill to be dismissed; and the plaintiff appealed to this court.

R. M. Morse, for the plaintiff.

A. J. Bailey & W. D. Turner, for the defendants.

HOLMES, J. The power given by St. 1885, c. 249, § 1, to the board of aldermen, to "take in fee for the city of Boston any land that they may deem necessary for" "the purposes of building and maintaining the system of sewers of said city, and discharging sewage therefrom," is a power to take the title in fee simple absolute to the land. *Page v. O'Toole*, 144 Mass. 303. *Dingley v. Boston*, 100 Mass. 544, 554. It follows that the plaintiff cannot maintain her bill on the ground of her supposed possibility of reverter in the lands taken by the city for a sewer. See further *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544, 547.

The plaintiff claims relief on the further ground that her remaining land will be seriously injured by the proposed use of the city's sewer. It is true that, under the contract between the city and the Commonwealth, more sewage naturally will be discharged than would be if the city should use its sewer for its own sewage alone. But while the contract is authorized by St. 1889, c. 439, § 4, it is assumed by the plaintiff that no provision is made in that statute for compensation to her for damage which her remaining land may suffer from the increase in the discharge. We make the same assumption, without deciding the point or expressing an opinion upon it. It might be possible to read the words of § 4, that the Commonwealth "shall pay . . . all damages that shall be sustained by any person or corporation by reason of such taking or entering as aforesaid," as referring to any taking or entering authorized by the section, and also to say that the statute did not require a description to be filed of the plaintiff's remaining land affected by the entering. *Taft v. Commonwealth*, 158 Mass. 526, 547.

But granting so much to the plaintiff, we still are of opinion that the bill shows no ground for relief. The act of 1885, when it authorized land to be taken for a system of sewers in the language quoted at the beginning of this decision, authorized the building and use of the sewers. It is true that the only

damages provided for are those "sustained by any person in property by the taking of any lands as aforesaid," and that this does not include damage to adjoining lands by the use of the sewers, except so far as that caused by increased proximity may be allowed in estimating the damages for taking land, on the principle of *Walker v. Old Colony & Newport Railway*, 103 Mass. 10, and *Taft v. Commonwealth*, 158 Mass. 526, 548, 549. But within bounds a statute may authorize what but for it would be a nuisance, and it does not appear that this statute goes beyond the bounds. *Taft v. Commonwealth*, *ubi supra*. *Sawyer v. Davis*, 136 Mass. 239. The only question is what kind of a sewer and what extent of use are authorized by the act of 1885. It was as plain then as now that the city might grow, and that it might take in new territory. We cannot think that the extent of the use permitted was intended to vary with the accident of municipal limits. The sensible view seems to us to be that the city is granted the right to make and use any drain which is natural to the configuration of the ground. It does not appear that the intended use of the sewer is beyond the scope of the act of 1885, so construed.

We decide nothing as to what the plaintiff's rights would be in case it should turn out hereafter that the use of the sewer destroys the whole value of the plaintiff's remaining land.

Bill dismissed.

EDWARD O. MERRILL & another vs. CAPE ANN GRANITE
COMPANY.

Suffolk. January 23, 1894. — March 30, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Distribution of Surplus by Receivers among Stockholders — Assignment for Benefit of Creditors of Stockholder indebted to the Corporation — Equitable Set-off.

The stockholders of a corporation which had become unable to obtain money to carry on its business voted that proceedings be instituted for the appointment of a receiver to take charge of its assets and to close up its affairs. The capital stock was divided into five hundred shares of which A. owned two hundred and fifty, B. two hundred and twenty-five, and other persons the remaining twenty-

five. The vote was passed by stockholders representing four hundred and seventy-five shares, of whom B. was one, and the same stockholders united in a request in writing for the appointment of receivers. Thereupon, upon the petition of a creditor of the corporation and of B., receivers were appointed, who, after having discharged in full all the obligations of the corporation to its creditors, had remaining in their hands a considerable amount of money for distribution among the stockholders. When the receivers were appointed, B. was himself indebted to the corporation to an amount far exceeding the amount which finally remained in the hands of the receivers for distribution. Subsequently to the appointment of receivers, B. made a general assignment to trustees for his creditors, to whom his indebtedness exceeded the assets of his estate. The receivers of the corporation, in accordance with an order of court, assented to B.'s assignment, and became parties thereto, and filed with the trustees a proof of the claim of the corporation against him, to which was annexed a statement that it was "without waiving any rights in law or equity which we may have by way of set-off or otherwise on account of dividend or dividends or payments from funds in our hands upon stock of the Cape Ann Granite Company standing in the name of B. at the time we were appointed receivers of said Cape Ann Granite Company." The assignment executed by B. contained a clause providing that the creditors who should assent and sign should thereby accept and take in payment of their respective debts the dividend payable under the assignment, and that they severally discharged B. from all such demands. The order under which the receivers became parties to the assignment was entered upon their petition, in which it was recited that it was necessary for the corporation to become a party in order to share in the dividends, and that it was for the interest of the corporation so to do, and the decree in terms allowed the receivers to become parties to the assignment, and thereby compound the liability of B. to the corporation, and to accept the dividends paid under the assignment in full discharge of that liability. *Held*, that, as the corporation was not dissolved, but continued as an existing corporation, and the certificate of stock owned by B. being held by his trustees, who had paid no dividend under the assignment, the creditors of B. had under the assignment no equity superior to that which he had when he made the assignment, and that the stockholders of the corporation other than B. and his trustees had an equity superior to that of B. to the fund in the hands of the receivers, and that a set-off against the claim of his trustees to a distributive share of the funds in the hands of the receivers should be allowed.

BARKER, J. The question for decision is raised by the appeal of the administrators with the will annexed of the estate of Benjamin F. Butler from a decree of the Superior Court, upon the petition of the receivers of the Cape Ann Granite Company for instructions as to the division among its stockholders of a considerable amount of money, which remains in their hands after having discharged in full all the obligations of the corporation to its creditors.

The corporation was organized in the year 1869, and its business was the quarrying and furnishing of granite for buildings

and for other purposes. In the autumn of 1891, finding itself unable to obtain money with which to carry on its operations, its stockholders by vote directed its president to cause proceedings to be instituted for the appointment of a receiver to take charge of its assets and effects, and for the liquidation and closing up of its concern, and especially to complete certain contracts to furnish stone for the erection of certain buildings. The capital stock of the corporation was divided into five hundred shares, of the par value of one hundred dollars each, two hundred and fifty of which shares were held by Mr. Butler, two hundred and twenty-five by Jonas H. French, and the other twenty-five by other persons. The vote mentioned was passed on November 15, 1891, by stockholders representing four hundred and seventy-five shares, one of whom must therefore have been French, and the same stockholders united in a request in writing for the appointment of receivers. Thereupon a petition to the Superior Court was signed, on November 16, 1891, by the firm of E. O. and F. H. Merrill, who were creditors of the corporation to the amount of only \$71.24, and by Jonas H. French, praying that receivers might be appointed to take charge of the estate and effects of the corporation, and to manage and control its affairs, and to close up its concern and dispose of its property should such a course become necessary, to carry out the contracts if found advisable, and to do such things in connection with the estate as the court should decree, and as should be proper and for the benefit of the corporation, its stockholders, creditors, and other persons interested.

On November 20, 1891, receivers were appointed to take possession of all the assets of the corporation, and were authorized to carry out its contracts, and to incur and defray such expenses consistent with the purposes of the corporation and the management of its business as might be necessary for the protection and maintenance of the property received by them, and the winding up of the affairs of the corporation.

At this time French was himself indebted to the corporation to an amount, as the receivers now allege, exceeding \$75,000, which the agreed facts state is far in excess of the amount now in the hands of the receivers for distribution, and no part of which has since been paid. On November 25, 1891, French

made a general assignment to trustees for the benefit of his creditors, to which a great majority of them in number and amount have assented, and his indebtedness to them far exceeds the assets of his estate. The receivers of the corporation, in accordance with an order of court granted on May 13, 1892, assented to French's assignment, and became parties thereto before June 1, 1892; and on August 17, 1893, they filed with the assignees or trustees of French a proof of the claim of the corporation against him, to which was annexed a statement that it was "without waiving any rights in law or equity which we may have by way of set-off or otherwise on account of dividend or dividends or payments from funds in our hands upon stock of the Cape Ann Granite Company standing in the name of Jonas H. French at the time we were appointed receivers of said Cape Ann Granite Company."

The assignment executed by French recited that he was unable to pay his debts at maturity, and desirous to convey all his property for the benefit of his creditors, to be distributed in substantial conformity with the provisions of the law concerning insolvent debtors; and it transferred all his property, except that exempt by law from levy on execution, to the assignees, in trust to pay over and distribute the proceeds in the manner provided by the insolvent laws for the distribution of insolvent estates, with a clause providing that for the purpose of distribution all claims were to be made up as if due on November 25, 1891, interest being added or rebated as each case might require, and also with a clause providing that the creditors who should assent and sign should thereby accept and take in full payment and discharge of their respective debts existing at that date the dividend payable under the provisions of the assignment, and that they severally released and discharged French from all such demands. The order under which the receivers of the corporation became parties to this assignment was entered upon a petition of the receivers, filed on April 22, 1892, reciting the facts of the existence of the claim against French and of his assignment, and that it was necessary for the corporation to become a party in order to share in the dividends, and that it was for the interest of the corporation and its creditors, and of all persons having any interest in the corporation, that the receivers should become parties

to the assignment and accept the dividends thereunder in full discharge of the liability of French to the corporation, and praying that the receivers might be ordered to become parties to the assignment, and thereby compound the liability of French to the corporation, and accept the dividends paid under the assignment in full discharge of that liability. The decree in terms allowed the receivers to become parties to the assignment, and thereby compound the liability of French to the corporation, and to accept the dividend paid under the assignment in full discharge of that liability.

The Cape Ann Granite Company has not been dissolved, but is an existing corporation. The certificate of stock which was held by French is now in the hands of his assignees. They have as yet paid no dividends under the assignment. The receivers of the corporation have sold all the property of the corporation not including its claim against French, and have performed its contracts and paid all its debts in full, both principal and interest, and have in hand about \$20,000, to be divided among the stockholders, or disposed of as the court may order. Under these circumstances the receivers have petitioned the Superior Court for instructions, whether in the division of the fund the stock standing in the name of French is to be charged with the debts due from him to the corporation.

Upon this petition the Superior Court has adjudged that the debt due from French cannot be set off against the claim of his assignees to a distributive share of the fund in the hands of the receivers, and the receivers have been ordered to distribute the fund among the stockholders in the proportion in which they owned stock when the receivers were appointed, paying to the assignees of French the share due to the stock which then stood in his name. From this decree the administrators of the estate of Mr. Butler have appealed, and the agreed facts conclude with the statement that the question presented is whether the debt due from French to the corporation can be set off against the claim of his assignees to a distributive share of the fund in the hands of the receivers.

In dealing with this question we are not embarrassed by technical rules as to parties or pleadings, nor limited by statute provisions as to set-off, but are at liberty, in the exercise of a

jurisdiction possessed by the Court of Chancery before the enactment of such statutes, to apply the doctrine of set-off as grounded upon natural equity. *Ex parte Stephens*, 11 Ves. 24, 27. No doubt the general rule in equity as well as at law is that demands to be set off must be mutual, and that debts accruing in different rights cannot be set off against each other. But when there are peculiar circumstances which make it necessary, as the only way to prevent a clear injustice, to allow the set-off of debts not mutual but accruing in different rights, this may be done by courts of full equity jurisdiction. It has been held that in such cases they look beyond forms to the essence of transactions out of which the demands arise, and beyond the nominal parties to those to be affected by the decree; and if a party to be so affected has a clear natural equity, arising out of the transactions and superior to any equity which can be urged in favor of those for whose benefit the claim to an equitable set-off is resisted, such courts may order debts not mutual, but accruing in different rights, to be set off and made to discharge each other. See *Holbrook v. American Ins. Co.* 6 Paige, 220, 231; *Blake v. Langdon*, 19 Vt. 485; *Brewer v. Norcross*, 2 C. E. Green, 219; *Hannon v. Williams*, 7 Stew. 255.

In the present case, those who have the ultimate interest are the creditors of French on the one side, and on the other those who were his fellow stockholders when the receivers were appointed. No facts appear which give to the creditors of French a better equity or higher claim than he himself could urge. Before their rights to an interest in the corporation accrued through him, the corporation had been placed by his acts in such a position that the only possible advantage which he or any other stockholder could derive from the ownership of stock must come through the decree of a court of equity; and unless for some reason it should be found by the court just and equitable to discharge the receivership and allow the corporation as a going concern to resume the exercise of its franchise and again pursue the purposes of its charter, it must come in the form of a dividend to be made among the stockholders after the demands of all other persons shall have been satisfied in full. No stockholder, and least of all French, upon whose petition the receivers were appointed, could justly or equitably claim the right there-

after, and while the receivership continued, to treat the corporation as a going concern, with the result of withholding from the fund to be raised to adjust its affairs the debt due to it from himself, and at the same time of sharing in its dividends. The decree of receivership was equivalent, so far as his equitable rights in the adjustment of the corporate property were concerned, to a dissolution of the corporation; and his creditors and the assignees of his estate have succeeded only to his rights and equities. While a corporation ordinarily has no lien on the shares of a stockholder who is indebted to it, it may set off the dividends of a stockholder against his debt. *Sargent v. Franklin Ins. Co.* 8 Pick. 90. *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183. The interests of stockholders in a corporation which has been put into the hands of a receiver to be wound up are thereby reduced, as in the case of a dissolution, (see *James v. Woodruff*, 10 Paige, 541, 546,) "to mere equitable rights to their several distributive shares of the corporate funds, upon principles of equal justice and equity among all the stockholders, after paying all debts and expenses"; but, in the case of a receivership without a dissolution, with the additional possibility that, if the circumstances shall be found to justify such a course, the receivership may be discharged, and the corporation allowed to resume its functions and manage its own affairs. To do equal justice and equity among these stockholders requires that the fund to be distributed should be made to repay to the corporation, so far as it is sufficient to do so, that share of the corporate funds which French, by becoming indebted to the corporation, had withdrawn for his individual use, to the detriment of the other stockholders. This is plain natural equity, and his insolvency makes it impossible to do justice to the other stockholders except by making his distributive share of this fund compensate, so far as it will, the debt which he owes to the corporation, and is therefore a peculiar circumstance which makes it the duty of a court of equity to order the debt to be set off against the dividend.

His assignees took the stock after the receivership proceedings were commenced, and subject to the equities which had thereby sprung up, and no reason is shown why his creditors, whom the assignees represent as well as the debtor, have an equity superior

to that of the other stockholders. Strict technical rights, in this instance springing from the relations of the stockholder to the corporation, must give way to the substantial equities of the real situation, as in other instances in which the doctrine of set-off is applied. No doubt, if the assignees had sold or should now sell the shares of French, the price received would be assets over which the court would have no control; but the purchaser, like the assignees themselves, taking title *lis pendens*, would be subject to all the equities to which French himself was subject, and could not successfully contend that a dividend on the shares should be paid without regard to the debt due to the corporation from French.

The case of *Merchants' Bank v. Shouse*, 102 Penn. St. 488, is relied upon as an authority against the set-off in the present case. But that was not a case in equity, the transfer of the stock to the administrators was before the bank went into liquidation, and to have allowed the set off claimed by the bank would have given it a preference. The case was the ordinary one of a corporation attempting to assert a lien upon the shares of a stockholder for his debt to the corporation. Nor are the numerous cases in point in which courts have refused to set off deposits in insolvent banks and similar corporations against liabilities of the stockholder to contribute to a fund to be used for the payment of all the debts of the corporation. There the controlling equity lies with the creditors of the corporation, and reverses the usual principle of set-off which would prevail if the question were between the stockholder and the corporation alone. But here the creditors of the corporation to which French was indebted have been paid in full, and those cases do not apply. The creditors of French have no equity as against either the corporation or its other stockholders, because French, under whom they claim, had none either at the time when his assignment was made or before. His legal right to claim that his stock was property not subject to his debt to the corporation was not an equity, but a right of strict law; and the assignment to his assignees for the benefit of his own creditors was after he had charged it, by the institution of the receivership proceedings, with an equity in favor of his fellow stockholders.

In our opinion, the decree should be reversed, and the receivers

should be directed to distribute the fund now in their hands to the holders of the other two hundred and seventy-five shares of the capital stock, crediting upon what would otherwise be the amount of the debt due to the corporation from French a sum equal to that which would be required to pay upon his two hundred and twenty-five shares of the stock the same dividend which the other stockholders will thus receive in cash. If in future the assignees of French shall pay a dividend to the receivers upon the debt of French to the corporation, its amount will be adjusted in view of the credit now to be given upon his debt to the corporation, and of such further credit as would be required by the distribution of that dividend also among the holders of the two hundred and seventy-five shares to whom the present fund in the hands of the receivers is to be distributed.

Decree reversed, and decree to be entered in accordance with this opinion.

G. O. Shattuck & F. L. Washburn, for the administrators of the estate of Benjamin F. Butler.

C. Almy & W. H. Coolidge, for the assignees of Jonas H. French.

HENRY F. BUSWELL, administrator, *vs.* ROBY G. FULLER.

Norfolk. January 18, 1894. — April 5, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Promissory Note — Gift.

Where the payee of a promissory note handed it to the maker, saying, "I will give you this, — this note, as I have never helped D. [his son, and the maker's husband] hardly any," and the maker took it, folded it up, and put it in her pocket-book, where it remained for an hour or more, until the payee asked her to let him have it to keep to indorse the interest, and she returned it to him, and continued thereafter to pay interest thereon, the inference is justifiable that both the payee and the maker understood that the handing of the note to the maker was not a full gift; but if the transaction was a completely executed gift, and the new agreement to pay interest was a separate transaction, it is immaterial how much time elapsed between the making of the gift and the new agreement, and this question should be submitted to the jury.

CONTRACT, on a promissory note for seven hundred dollars, payable on demand to the plaintiff's testator.

After the former decision of this court, 156 Mass. 309, the case was tried in the Superior Court before *Blodgett, J.*, who ordered a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

S. H. Tyng & E. B. Powers, for the defendant.

H. F. Buswell, pro se.

BARKER, J. What occurred at the interview when the alleged gift was made is not now told as it was in the former bill of exceptions. As there stated, the substance of the transaction was that the donor passed the note to the defendant, and said he would give it to her, and that she at first supposed he was to let her keep it; but he immediately said he would like to have it so that he could indorse the interest, and, after holding it long enough only to look it over and count up the payments of interest, she returned it with a remark in reference to the future payments of interest, and thereafter paid interest to the donor during his life, signing a new note when the old one was covered with the indorsements. Upon this statement, it was held that the donor never meant to give up his right to have the interest paid while he should live, and that there was no evidence that he intended to give up the possession of the note so that he could no longer avail himself of it for the collection of interest, or that the defendant ever understood that she was to have it absolutely in his lifetime. This was put upon the grounds, that, "if when he handed her the note she supposed he was going to let her keep it, he immediately corrected her misunderstanding by telling her that he was to retain it so that he could indorse the interest on it"; and that "there was nothing to indicate that there were two separate transactions, one an absolute giving up of the note and a relinquishment of all claim under it, and the other a new arrangement, without consideration, that interest should be paid during his life, and that the note should be given back to him by the defendant as evidence of her voluntary promise to pay interest."

At the new trial, the sole issue was whether there was in fact a perfected gift. The evidence tended to show that when

the defendant in 1875, and again in 1878, offered to pay a part of the principal, the testator had refused to receive it, saying that he did not wish her to pay anything on the principal, and that all he wished her to do was to pay the interest; that in 1881 he came to her house, and that the two were together there in a room in which was her son also, ill upon a lounge; that the testator took the note from his pocket, and handed it to her, saying, "I will give you this, — this note, as I have never helped Daniel [his son and her husband] hardly any, — he has been a good and faithful son to me"; that she took the note, and accepted it, and looked it over and counted the indorsements, and remarked that she had paid nearly half of the principal in interest, and then folded up the note and put it in her pocket, and, as she thought, in her pocket-book, where it remained an hour or more, and until the old gentleman was about to leave; that during this interval of an hour or more the conversation was about other matters, and was shared in by the defendant's son; that just as the testator was about to leave, he again, for the first time since she had put the note in her pocket, referred to the note, and asked her to let him take it, so that he might have it to keep to indorse the interest upon, but did not tell her that he wanted her to pay interest on it thereafter, and that she then returned him the note; that later on he told her that he wanted the interest to pay his taxes with as long as he lived; that he never asked her for any part of the principal, but she continued to pay the interest, though not always regularly; and that the new note was written by him because there was not room to indorse the interest upon the old one, as that was nearly covered with indorsements. The testimony as to what happened at the interview came from the defendant, and was corroborated by her son, who was present. There was also evidence that the alleged donor had told two other persons, who were witnesses, that he had given the note to the defendant.

The handing of the note to her, with the declaration, "I will give you this, — this note," with evidence that she took the note and accepted it, and, after examining it and speaking about the payments which had been made upon it, put it away in her own pocket and kept it there while the conversation went on about

other things and with another person for an hour or more, if not controlled, would require a finding of a completed gift. But the parties to the transaction were an old gentleman and his daughter in law, and the interview was part of a familiar visit made by a father at his son's house. The note was not something which he had procured as a gift for the defendant, and this talk about it was not the first which the parties had had, nor the last. If, when after an hour or more but before the parties separated he asked for the note, she had declined to give it back and had claimed that it was her own, the case would have been quite different. As she did not decline to return the note upon his first request, and continued to pay him interest for years, signing the new note at his request, the inference is justifiable that both understood that the handing of the note to her with the words stated was not a full gift of the note, and that both understood that during his life he was to receive the interest, and that she was to pay it as before.

But if the transaction was a completely executed gift, and the new agreement to pay interest was a separate transaction, it is immaterial how much time elapsed between the making of the gift and the new agreement. Whether this instruction should have been given and the case submitted to the jury, or the verdict for the plaintiff was rightly ordered, depends upon whether a verdict for the defendant upon the whole evidence could fairly be allowed to stand. Is the inference from all the circumstances that there was no design to make and receive an absolute and complete gift of the note one which is so strong and clear that a court which sits to do justice cannot accept a contrary conclusion if arrived at by a jury? In this connection, the testimony of the two persons to whom the alleged donor said that he had given the note to the defendant is of importance, as tending to prove by evidence which is not shown to come from interested persons that there was an actual gift of the note. The relationship of the parties, and the footing upon which the old gentleman would seem to have stood with the defendant and her family, are not unfavorable to the supposition that she might, in an hour after having accepted from him an absolute gift of the note, have returned it to him at his request as a new transaction and without consideration.

The plaintiff asked the court to rule that "the above recited facts did not, as matter of law, disclose a defence to his action," and the court allowed this motion of the plaintiff, and directed a verdict for him. We interpret this to mean that, in the opinion of the presiding justice, the case as presented at the second trial was so substantially identical with that already passed upon by this court that he would not be justified in submitting to the jury the question whether the gift and the new agreement to pay interest were separate transactions. Upon the whole, we are of opinion that, as the case is now presented, there is evidence proper to submit to a jury.

Exceptions sustained.

C. E. BUSWELL & others vs. SUPREME SITTING OF THE
ORDER OF THE IRON HALL & others.

Worcester. March 15, 16, 1894. — April 16, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Beneficiary Association — Reserve Fund — Receiver appointed in another State.

A receiver appointed by a court of equity in a foreign jurisdiction, to whom an insolvent corporation organized under the laws of that jurisdiction, its officers and agents, are ordered to assign and deliver all its property and effects, and have assigned and delivered them accordingly, is in effect an assignee of such corporation; and, if he acts under a court of competent jurisdiction of the State by which the corporation was created, and in which its principal offices are situated and its principal business is carried on, he has a standing to intervene in and be heard on a proceeding in this Commonwealth for the appointment of a receiver of the property of the corporation found here.

If a person, by attachment or otherwise, has obtained a valid lien on the property in this Commonwealth of a foreign corporation, such lien is not dissolved by the filing of a bill or the appointment of a receiver, but must be enforced; but where there is no such lien, the general principle is that the property should be so administered that all claimants should receive their equal ratable shares of the whole property of the corporation.

A fraternal beneficiary association incorporated and having its Supreme Sitting in another State, with local branches in this Commonwealth holding a charter and working under the jurisdiction of the Supreme Sitting, established a benefit fund wherein members, under specified conditions and regulations, might become participants, and from which they might receive indemnity when by

reason of disease or accident they became totally disabled from following any vocation. The fund was derived from assessments upon the holders of benefit certificates made by the Supreme Sitting of the Order, from time to time, through the local branches. Eighty per cent of the amount received by each branch on each assessment was sent to the supreme cashier of the Supreme Sitting, while the remaining twenty per cent was set aside and retained by the local branch as a reserve fund, but was the property of the Supreme Sitting, and at all times subject to its control. *Held*, that the legal title to the reserve fund, which was essentially a part of the benefit fund, was in the Supreme Sitting and not in the different local branches, and was held in trust for all the holders of benefit certificates; and that upon the insolvency of the association, and the appointment of a receiver thereof by a court of competent jurisdiction of the State where the association was organized who was authorized to collect all the moneys belonging to the order in the possession of all the branches wherever organized for the purpose of equally and ratably distributing them among the creditors and certificate holders wherever residing, the receiver might maintain a petition, in a proceeding brought in this Commonwealth by a certificate holder for the common benefit of himself and other certificate holders, to obtain for such distribution the funds held by the receiver appointed here, and, after an allowance to the latter for his charges and expenses and the payment of the expenses of the suit, the balance of the reserve and benefit funds should be transmitted to the foreign receiver, provided that the court by whom he was appointed should distribute the whole fund within its control so that the benefit certificate members of the local branches here should receive the same proportionate dividend as benefit certificate members of branches in other States who should be admitted to share in the fund.

FIELD, C. J. On October 26, 1892, James F. Failey, the receiver of the defendant corporation, appointed by the Superior Court of Marion County in the State of Indiana, presented his petition to the Superior Court of this Commonwealth to be admitted as a party respondent in the present suit, and he prayed that some person might be appointed as receiver ancillary to the proceedings in Indiana, with the usual authority to take possession of all the property of the corporation in this Commonwealth, to collect all debts due to said corporation here, and that, after deducting the proper charges and expenses, to be determined by the Superior Court here, said ancillary receiver should be ordered to "pay over to said Failey, receiver, for distribution to the membership of the said Order, including the citizens of this State, said funds, provided that, before such remittance be made, this court [the Superior Court here] reserves the right to require assurance from the Marion Superior Court aforesaid that, upon the receipt of said funds, and in making the distribution, all citizens of this State, members of said Order or creditors thereof, shall be entitled to receive as much ratably in propor-

tion to their several claims as the citizens of Indiana or any other State." This petition was denied by the Superior Court here, and Mr. Failey appealed to this court. On December 21, 1893, Joshua B. Stearns filed in the Superior Court his petition averring that he was a member of Local Branch No. 34 of the Order existing at Cambridgeport in the county of Middlesex, and was the owner of the certificate No. 35,953, for the sum of \$1,000, issued by the defendant Order under date of January 30, 1886; and he recited various orders and decrees of the court in Indiana, and made in substance the same prayer as Mr. Failey. George W. Whitney was admitted as a competitor with Stearns. Both Stearns and Whitney were admitted as parties defendant, and at the hearing on this petition they offered competent evidence to prove the allegations of the petition, to which the plaintiff objected upon the following grounds: "first, that the petitioners, being defendants, had no standing in court for the relief sought for in the petition; secondly, that the allegations of the petition were insufficient to warrant the relief sought for." The presiding justice sustained the objections, and dismissed the petition, and the petitioners appealed.

The report of the justice of the Superior Court, before whom the hearing was had, then proceeds as follows: "It was then stipulated by the parties, in open court, that if the decree dismissing the petition was erroneous upon the ground that the petitioners had a right to be heard upon their petition, although defendants in the case, the said decree should be annulled, and the petition should be sent back for a hearing thereon, provided that the allegations of the petition were sufficient to authorize a decree, in the discretion of the court, for the petitioners. It was further stipulated that the twelfth edition of the constitution and by-laws of the defendant corporation should be considered a part of the record, and that any part thereof may be referred to at the argument, but without prejudice to the right of any party to question the accuracy of such constitution and by-laws in any future proceeding. Also that the reports of the receiver on file in this case may be referred to, and arguments may be based upon facts therein stated." Thereupon the justice, being of opinion that his decree

so affected the merits of the controversy that the matter ought to be determined by this court before further proceedings were had, reported the questions to this court.

The bill in the present suit was filed on August 24, 1892, in the Superior Court for the County of Worcester, by C. E. Buswell, against the Supreme Sitting of the Order of the Iron Hall, described as "a foreign corporation organized under the laws of the State of Indiana, and having its legal location in the city of Indianapolis and State of Indiana, and doing business in this Commonwealth," and against the "Local Branch No. 396 of the Order of the Iron Hall located at Worcester, in the county of Worcester and Commonwealth of Massachusetts, a voluntary association holding a charter from and working under the jurisdiction of the Supreme Sitting of the Order of the Iron Hall," etc., and against certain savings banks with which said local branch had deposited the twenty per cent of the amount received from the assessments collected from its members, "which amount constitutes a reserve fund, and is claimed to be the property of, and under the control of, said Supreme Sitting." The plaintiff Buswell was a member of said local branch, and the holder of a benefit certificate for \$1,000. He prayed for a receiver of said local branch, for an injunction, and for a *pro rata* distribution of said reserve fund among the certificate holders of said local branch. This bill was afterwards amended by the plaintiff so that it should stand as brought "in behalf of himself and any and all other certificate holders of the Order of the Iron Hall hereinafter mentioned, who may hereafter be joined as parties herein," and the prayer of the bill was amended so that it should read as follows: "that a receiver may be appointed to take charge of all the business, property, goods, effects, and assets of said defendant, the Supreme Sitting of the Order of the Iron Hall within this Commonwealth, and distribute the same among certificate holders of the local and sisterhood branches, organized in, and creditors residing in, this Commonwealth, according to law and the order of the court"; and an order was obtained that all such local and sisterhood branches pay over and deliver to the receiver appointed by the court all property of the principal defendant, and all moneys and property deposited by the officers of the local branches in

this Commonwealth; and by a subsequent order the receiver was empowered "to receive any and all property out of this Commonwealth belonging to said defendant corporation, the Supreme Sitting of the Order of the Iron Hall, and deposited in any banking institution, or with any corporation, association, or individual, by officers or trustees of local branches in this Commonwealth; and all moneys, funds, and property, wherever situated and being, which in law or in equity belong to certificate holders members of subordinate branches or lodges within this Commonwealth." The receiver appointed here holds a large sum of money which he has collected from these local branches, or from their officers or depositaries. A decree has been entered in the Superior Court to the effect that the reserve fund be distributed "among the members of local and sisterhood branches organized within this Commonwealth, the funds of which branches have been transferred to the receiver here appointed," etc. The decree also declares that what is called the general fund, as well as the paraphernalia, etc., is to be deemed to be the property of the local and sisterhood branch the members of which contributed to the same, and that this property is to be charged with the debts of such branch, and directs that it shall be repaid or redelivered to such branch, provided that the branch "has so far maintained its organization as to empower some person to receive the same"; otherwise, it is to be applied to the payment of the debts of the branch in full or *pro rata*, as the case may be, the surplus, if any, to be distributed among the members of the branch to which the property belonged.

Although the facts averred in the petition of Mr. Failey and the petition of Stearns have not been found to be true, yet for the purpose of determining the questions of law before this court the averment of facts in these petitions must be taken to be true. The principal facts are that Mr. Failey was appointed receiver on August 23, 1892, by the court in Indiana, under the laws of which State the corporation was organized. It is not contended that the court in Indiana did not have jurisdiction over the defendant, or that the appointment of a receiver was not within the power of that court. The receiver appointed by that court was empowered to sue, in his own name as receiver, all persons within or without the State of Indiana, and to receive

and collect all the property of the defendant within or without that State, and all persons within or without that State were ordered to deliver said property to said receiver. The defendant, its officers and agents, were ordered to assign and deliver to said receiver all its property and effects, and it appears that the defendant has assigned and transferred to said James F. Failey, as such receiver, "all the moneys and securities of every kind belonging to the reserve fund of said Supreme Sitting, and held by each of the branches thereof, and the officers of such having the same in possession and control." Mr. Failey, then, on the facts averred, is not merely a receiver, but he is an assignee of the reserve fund of the Order held by the several branches as fully as the court in Indiana and the assignment of the Supreme Sitting of the Order, in accordance with the decree of that court, can make him an assignee.

Without considering the right of a receiver appointed by a court of equity in a foreign jurisdiction under general equity powers to sue or intervene in his own name in this Commonwealth, we think it clear that Mr. Failey, on the allegations of his petition, must be taken to be, in effect, an assignee of a foreign insolvent corporation, acting under a court of competent jurisdiction of the State by which the corporation was created, and in which its principal offices were situated and its principal business was carried on. We think such an assignee has a standing to intervene in and be heard on a proceeding in this Commonwealth for the appointment of a receiver of the property of the corporation found here. We assume that the proceedings in this Commonwealth, whether they be regarded as ancillary to the proceedings in Indiana or as independent proceedings, are within the jurisdiction of the Superior Court here, and we infer that, as no creditor of the defendant has appealed from the decrees entered by that court, the creditors are satisfied therewith. See St. 1892, c. 435. The receiver reports that he holds only \$697.85 money belonging to the general fund, with a small amount of other property, against which there are outstanding claims far exceeding the amount of the money and property belonging to this fund in his hands. The amount of the claims of creditors upon this fund is not stated in the papers before us.

The only dispute between the parties before us is with regard to the benefit and reserve funds, and the rights of benefit certificate holders thereto. This renders it necessary to examine the constitution and laws of the Order. Law I. § 1, is as follows: "There shall be attached to this Order a Benefit Fund, in which members may participate (except social members), as they may severally elect, either in the sum of one thousand dollars, eight hundred dollars, six hundred dollars, four hundred dollars, or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table," etc. One of the objects of the organization, as stated in Article II. § 3, of the constitution, is as follows: "To establish a Benefit Fund from which those who have held membership in the Order for thirty days or more may, should they so desire, on proper application, and complying with all the rules and regulations governing said Benefit Fund, become participants therein, and may receive the benefit of a sum not exceeding twenty-five dollars per week, nor more than one half of the amount of the benefit certificate held by each member, when, by reason of disease or accident, they become totally disabled from following any avocation; or in case of death, if a member for more than two years, one half of the amount of the benefit certificate will be paid, less benefit received; or an amount of not more than one thousand dollars when they have held a continuous membership in the Order for seven years. Provided, however, that the sum total drawn from this Order by any of its members shall never exceed, in sick, disability, death, and final benefits, the sum named in the benefit certificate." This benefit fund is derived from assessments upon the holders of benefit certificates, which assessments are made by the Supreme Sitting of the Order from time to time, and out of which benefits are paid in case of the sickness, disability, or death of a member. The assessments are made through the local branches, and eighty per cent thereof are sent to the supreme cashier of the Supreme Sitting. Law II. § 1, is as follows: "Twenty per cent of the amount received by each branch on each assessment shall be set aside and retained as a Reserve Fund, which fund is the property of the Supreme Sitting, and shall be subject to its control at all times, as hereinafter provided. At the expiration of the

first term of six years and six months from the date of the organization of the Order, one seventh of the Reserve Fund then on hand shall be called for by the supreme accountant and used by the supreme cashier in the payment of benefits, and annually thereafter one seventh of the Reserve Fund on hand shall be called for, and used in like manner, unless otherwise ordered by the Supreme Sitting." The greater part of the property in the hands of the receiver appointed by the Superior Court here is derived from this reserve fund held by the local branches organized within this Commonwealth.

An examination of the various provisions of the constitution and laws of the Order convinces us that the legal title to this reserve fund is in the Supreme Sitting of the Order, and not in the different local branches; that the twenty per cent of the assessment retained by each local branch differs from the eighty per cent transmitted to the Supreme Sitting mainly in this, that the possession and supervision, subject to the constitution and laws, remain with the local branches. The whole fund is for the protection of and payment of benefits to holders of benefit certificates, and the reserve fund seems to us essentially a part of the benefit fund, although it may be in the nature of a safety fund to insure the payment of maturing certificates. See *Burdon v. Massachusetts Safety Fund Association*, 147 Mass. 860. We infer that the Superior Court here has not regarded the reserve fund held by each branch as the special property of that branch. It has ordered all the reserve funds received from all the branches in this Commonwealth to be distributed as one fund among the certificate holders of all said branches. It appears, indeed, from the receiver's second report, that there are some branches in this Commonwealth which have transferred the reserve fund in their possession to Mr. Failey as receiver, and we infer that the decree of the Superior Court here does not admit certificate holders of these branches as claimants to the fund in the possession of the receiver here.

It appears by the petition of Mr. Failey, that the court in Indiana has authorized him to collect all the moneys belonging to the Order in the possession of all the branches wherever organized, for the purpose of equally and ratably distributing them among the creditors and certificate holders of the corporation,

whether residing in Indiana or elsewhere, and the purpose of Mr. Failey in filing his petition here was to obtain the funds in the hands of the receiver here for such distribution. Mr. Failey represents that in the States and Territories of the United States there are about 62,790 members, of whom about 10,022 are Massachusetts members, and that he has in his possession as receiver more than \$700,000 in money. The second report of the receiver appointed here shows that he has in his hands about \$280,000, which, with the exception of the amount hereinbefore stated as received from the general fund, has been received from the reserve fund or the benefit fund, nearly all being received from the reserve fund found in the possession of the branches in this Commonwealth. Under the constitution and laws of the Order, we regard the whole benefit fund, including the reserve fund, as held in trust for the holders of all the benefit certificates of the Order. *Coe v. Washington Mills*, 149 Mass. 543. This reserve fund, as held by each branch under the constitution and laws, was not intended to be used exclusively in paying benefits to the members of that particular branch, but was ultimately to be transmitted to the supreme cashier of the Supreme Sitting, to be used for the payment of benefits generally. Having been kept apart from the general benefit fund, the reserve fund in the possession of each branch is shown to have been derived exclusively from assessments upon the past or present certificate members of that branch, and in this respect it may differ from the benefit fund generally, although in the accounts of property kept by the Supreme Sitting it should appear what proportion of the benefit fund in its possession has been derived from each branch.

It is impracticable to lay down a general rule which must govern all receivers appointed here of the property of foreign corporations found in this Commonwealth. If any person has obtained by attachment or otherwise any valid lien on the property of the corporation in this Commonwealth, such lien is not dissolved by the filing of the bill and the appointment of a receiver, but must be enforced. *Hubbard v. Hamilton Bank*, 7 Met. 340. *Taylor v. Columbian Ins. Co.* 14 Allen, 353. *Folger v. Columbian Ins. Co.* 99 Mass. 267. When there is no such lien, the general principle is that the property should be so administered that all

claimants should receive their equal ratable shares of the whole property of the corporation, and the court here will, if necessary, protect claimants who are citizens of Massachusetts in their right to receive such shares. This is the principle adopted by St. 1890, c. 321, relating to the insolvency of certain foreign corporations in this Commonwealth. It is there provided that it shall be the duty of the assignees appointed here, "so far as practicable, to distribute such assets in such a manner that all creditors of the insolvent corporation, whether within this State or elsewhere, shall receive proportionate dividends out of the assets of said corporation, whether the same are within the control of said assignees or not." § 2. The same principle was adopted in the settlement of the insolvent probate estates of deceased persons not resident within this Commonwealth before there was any statute on the subject. *Dawes v. Head*, 3 Pick. 128. *Davis v. Estey*, 8 Pick. 475. The subject is now regulated by statute; Pub. Sts. c. 138; and the same principle is adopted in the statutes. The fourth section of this chapter, however, is as follows: "To this end his estate shall not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this Commonwealth have received the just proportion that would be due to them if the whole estate of the deceased, wherever found, that is applicable to the payment of common creditors, were divided among all the creditors in proportion to their respective debts, without preferring any one species of debt to another; and no creditor who is not a citizen of this Commonwealth shall be paid out of the assets found here, until all those who are citizens have received their just proportion as provided in the preceding section."

In the present case, the holders of benefit certificates do not seem to us to be common creditors of the defendant corporation, and the bill in the present case was not brought by a single creditor to collect a debt. It was brought by a holder of a certificate for the common benefit of himself and other holders of certificates, who, in a sense, are the beneficiaries of the benefit and reserve funds. The holders of certificates have been contributors to these funds, which were intended to be used for the payment of benefits to all such holders. It has become

impracticable for the corporation to carry out the purposes for which it was organized. The claims of the certificate holders have in general not matured, but, as an equitable method of determining the amount due them from these funds, the claims have been made up by taking the sum of all the assessments paid by each certificate holder in good standing in the Order, and deducting from it all amounts received by him for sick or disability benefits. As these funds were intended to constitute one fund for the benefit of all holders of benefit certificates who were members of the Order, we think it equitable that, so far as practicable, it should be so administered. It becomes, then, a question of the best practicable means of doing this. It would be extremely difficult to apply the rule established by Pub. Sts. c. 138, § 4, to the present case, as there are funds and local branches in all or nearly all the States of the United States. Some branches in one or more of the States under the laws of the Order may have sent their reserve funds to the Supreme Sitting before the institution of any proceedings in court, and the proportion between the amount of the funds and the amount of the claims of the certificate holders in any one State must differ from that in every other. It might be almost impossible to determine in any State what would be the ratio between the aggregate of all the funds wherever found, and the aggregate of all the claims of all the certificate holders wherever they reside. If the courts of each State should distribute all the funds found within the State exclusively among the certificate holders resident in that State, there necessarily must be great inequality in the distribution.

There is no statute which compels the court to proceed in any particular manner in the case at bar. It has been said in argument by the counsel for Mr. Failey, that by granting his petition the certificate holders resident in Massachusetts will probably receive more than under the decree made by the Superior Court. If this were certain, then, if that decree were carried into effect, it might be equitable that the certificate holders who have shared in the benefits of that decree should also be permitted to prove their claims before the court in Indiana, in order to obtain another dividend, so that they might

receive in the whole the same proportionate dividend as other members. But this is not certain; and if it were, it ought not to affect the general principles governing the distribution, although, under some circumstances, it might affect the mode of distribution, and, if the larger part of all the funds is in the hands of the receiver in Indiana, that fact deserves to be considered. If all members who are holders of benefit certificates ought to share proportionately in the whole fund, there ought not to be a decree that the fund here should be distributed among the members of the local branches existing here, if thereby such members would obtain more than their just proportion of the whole sum. If the money in being transmitted to the receiver in Indiana were in danger of being misappropriated or misapplied, or if the difficulties attending the transmission of the money and the proof of claims there by the certificate holders who are members of the local branches in this Commonwealth were so great as to make such proceedings impracticable, we have no doubt of the power of the court here to order a distribution of their proportionate shares among the certificate holders who are inhabitants of Massachusetts, or among those certificate holders who are shown to have contributed to the funds in the hands of the receiver here, whether inhabitants or not. From the necessity of the case the court here must have some discretion, and must reasonably protect the rights of the citizens of the Commonwealth in the administration of the trust. But in the administration of such a trust, when the property of the trust is found in many different States, comity requires that we should do all that safely can be done to insure, as far as practicable, a speedy and equitable distribution of the whole property among those entitled to it. One difficulty in this case, as we infer from papers submitted to us which are not strictly a part of the record before us, may be, that, by the decree of the court here, the general creditors of the local branches are not permitted to prove their claims against the benefit or reserve fund, but only against the general fund, which has been found to be the property severally of the different local branches. We infer that such general creditors are permitted in Indiana to prove their debts against the whole fund in the hands of the receiver appointed there *pari passu*

with the holders of certificates. We are not informed whether such debts are large, nor what is the amount of the general fund in the hands of the receiver there. If this difference in the administration is not such as considerably to affect the dividends of the certificate holders, we do not think it is sufficient to affect our decision. We infer that the court in Indiana and the court here have adopted the same principles in determining what holders of certificates are entitled to prove claims, and in what manner the amount of each claim is to be made up.

If the court in Indiana is willing substantially to distribute the whole benefit and reserve fund equitably and ratably among all the benefit certificate holders who are members of the Order, as it wishes to do if the allegations of the petitions are true, we think that, on the facts stated in the petitions, it should receive the aid of the courts here in doing this. The receiver here should be allowed his charges and expenses, and all expenses of the suit here should be paid, and he should be protected against all suits and claims; but the balance of the reserve and benefit funds should, if the allegations of the petitions be found to be true, be transmitted to the receiver in Indiana, provided it appears by the decree of that court that it will admit the proof of claims against the reserve and benefit funds as made in and allowed by the court here when regularly certified by the court here, subject to such revision by the court in Indiana as justice may seem to that court to require, and will distribute the whole fund in its control so that the benefit certificate members of the branches in Massachusetts shall receive the same proportionate dividend as the benefit certificate members of branches in Indiana and in other States who are admitted to share in the fund. If the time is not extended so as to admit such an allowance of the proof of these claims in the Indiana court on an equality with others, when the money is in fact ready to be transmitted, then the petitions should be dismissed. See *National Trust Co. v. Miller*, 6 Stew. 155, 158; *Parsons v. Charter Oak Ins. Co.* 31 Fed. Rep. 305; *Fry v. Charter Oak Ins. Co.* 31 Fed. Rep. 197; *Jennings v. Philadelphia & Reading Railroad*, 23 Fed. Rep. 569. The petitioners, including Mr. Failey, have a right to be heard on their petitions, and are not strictly to

be regarded as either plaintiffs or defendants, but as persons alleging an interest in the property in the custody of the court, and intervening in the cause. The case is remanded to the Superior Court, with instructions to hear the petitions, and to proceed therein in accordance with this opinion.

So ordered.

G. F. Williams & G. W. Anderson, for Failey and Stearns.

W. S. B. Hopkins, (*H. L. Parker & A. S. Pinkerton* with him,) for Buswell.

C. U. Bell, for certain certificate holders.

L. C. Southard, for other certificate holders.

HENRY W. PUTNAM, receiver, *vs.* JAMES J. GRACE & others.

Suffolk. December 14, 1893. — May 14, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Purchase of a Lease — Consent of Lessor to Assignment of Lease — Specific Performance.

A receiver was appointed of a fraternal beneficiary corporation which held an unexpired lease containing a provision that the lessee should not assign or let it for any more hazardous use, nor make any material alterations or additions other than those specified in the lease without the consent in writing of the lessor. On December 17, 1892, after the appointment of the receiver, A. offered in writing to purchase from him, for a stipulated price, the unexpired term. The receiver in writing accepted this offer "subject to obtaining the assent of B. [the lessor], and of the court if necessary." Prior to December 20, the lessor had orally consented to an assignment of the lease, but on December 23 he said to the receiver that he would not consent to such assignment. On December 28, the court gave its assent to the sale of the unexpired term by the receiver. The assent in writing of the lessor was never obtained, and on December 30 he gave to the receiver formal notice that the lease had been violated by the making of unauthorized alterations, but subsequently accepted rent from the receiver. *Held*, on a bill in equity for specific performance of A.'s agreement to purchase the unexpired term, and to compel B. to assent to its assignment, that, B. not having assented to the assignment of the term, A. was not bound to accept it. *Held, also*, that, A. not being bound at the time of filing the bill to accept the term, it could not avail the plaintiff if B. by a decree should be compelled to assent to the assignment of the lease.

If the form of a contract is such that the defendant has bound himself absolutely, and the plaintiff has not, a court of equity will be slow to lend its aid to enforce

such a contract in favor of the party who is not bound, and if, at the time of bringing his bill, the plaintiff is not bound to convey, equity will not ordinarily compel a defendant under such circumstances to accept a title.

BILL IN EQUITY, to obtain specific performance of an agreement for the purchase of an unexpired term of a lease, and to compel the lessor to assent to its assignment.

The bill alleged that the plaintiff, on November 1, 1892, was appointed the receiver of the American Protective League, a corporation organized in June, 1889, under the provisions of St. 1888, c. 429; that at the time of his appointment the League held a lease from James J. Grace, at an annual rent of \$12,000, of the building numbered 181 on Tremont Street in Boston, running until May 1, 1905; that the League occupied certain rooms in the building for the purposes of its business, and sublet the remainder; that during the period of its occupancy the League, with the knowledge and consent of Grace, had expended more than \$20,000 in extending the front of the building to the line of the street, and in otherwise enlarging and improving the premises, thereby increasing the value thereof; that at the date of the appointment of the receiver there remained an unexpired term of twelve years and six months, which was of value; that at divers times between September 13, 1892, and December 20, 1892, and on said December 20, the lessor Grace orally consented, through his counsel and personally to the plaintiff and others, to the sale and assignment of the lease, and to the appropriation of the money that might be obtained therefrom for the benefit of the League and of its creditors and certificate holders; that the plaintiff, relying upon such oral consent of the lessor, obtained a purchaser of the unexpired term, and on December 17, 1892, agreed in writing to assign it, together with certain office furniture in the rooms occupied by the League, to William D. Bradstreet and Joseph Bennett for the sum of \$5,600, which sum the purchasers Bradstreet and Bennett agreed in writing to pay therefor; that the defendant Bradstreet signed the agreement for and on behalf of Bennett, as well as on his own behalf, and subsequently, before the filing of the bill, the written agreement was ratified by the defendant Bennett in writing; that at the time of signing the agreement Bradstreet, acting on behalf of Bennett and himself, paid to the plaintiff

the sum of one hundred dollars on account of the purchase money as an earnest to bind the bargain, leaving a balance due of the purchase money of \$5,500; and that thereafter, on December 28, 1892, the plaintiff as receiver obtained a decree of the court assenting to the contract of sale and assignment of the lease to Bradstreet and Bennett, and authorizing the plaintiff to execute the same.

The bill further alleged that the plaintiff had the right to assign the lease without the consent of Grace, there being no covenant or provision therein affecting or curtailing his common law right to sign the same except that in the words following: "The said lessee for itself and its representatives further covenants that it or others having its estate in the premises will not assign this lease nor underlet the whole or any part of said premises for any use or occupation which may be fairly considered more hazardous or prejudicial to the value of the premises or of the neighboring property than the ordinary occupation of buildings of like character, nor make nor allow to be made any unlawful, improper, or offensive use thereof, and that no material alterations or additions other than those herein specified shall be made during the term aforesaid in or to the same, without the consent of the said lessor or of those having his estate in the premises being first obtained in writing allowing thereof"; that the assignment to Bradstreet and Bennett was not to be "for any use or occupation which may be fairly considered more hazardous or prejudicial to the value of the premises or of the neighboring property than the ordinary occupation of buildings of like character," nor was "any unlawful, improper, or offensive use" of the premises to be made; that the consent of Grace was not necessary to the validity of the assignment in the hands of the receiver, that Bradstreet and Bennett were bound to accept the assignment which the plaintiff has at all times been ready to give and to deliver to them, and to pay to the plaintiff the balance of the purchase money; that the plaintiff is informed and believes that Bradstreet and Bennett are ready and willing to perform the agreement on their part, and to accept the assignment without the written consent of Grace, if the court finds that such written consent is not necessary to a valid assignment thereof, and to accept it with such

consent, if the court finds it necessary; that the agreement of December 17, 1892, was made with the previous knowledge and consent of Grace that a contract for an assignment of the lease was to be immediately made by the plaintiff; that before January 1, 1893, the plaintiff tendered to Bradstreet and Bennett a valid assignment of the lease without the written consent of Grace, and offered to perform all the terms of the contract, but that the defendants Bradstreet and Bennett refused to accept the same or to perform the contract on their part; that on December 20, 1892, Grace was informed by the plaintiff that such a contract had been made, and then consented orally to the assignment and to Bennett as an assignee thereof, and made no objection to Bradstreet when informed that he was to be the co-assignee, but that on December 23, and again on December 27, Grace informed the plaintiff that he would consent to no assignment of the lease to any person or persons, and that he should enter upon the premises and take possession thereof; that Bradstreet and Bennett are in all respects fit and proper persons for assignees of the lease, and that no fair or reasonable objection to them as tenants can be alleged by Grace, even if his consent is necessary to a valid assignment of the lease, and that his refusal to give his consent, assuming it to be necessary, is unreasonable, vexatious, fraudulent, and contrary to equity and good conscience, and that he should be compelled by the process of the court to give the same; that on December 30 Grace sent to the plaintiff a written notice alleging that the terms of the lease had been violated by the removal of part of the wall between the leased premises and the adjoining estate, and by other material alterations not specified in the notice which he therein alleged had been made without his knowledge or consent, and that unless the premises were restored forthwith to the condition called for by the lease he would enter to determine it; that the only portion of the wall which had been removed was a small portion of the cellar or basement wall making an opening from the cellar or basement into the cellar or basement of the adjoining building; that it was made in August or September, 1892, by the lessee and occupant of the adjoining building, who leased from sub-tenants of the League the basement of the premises to be used in con-

junction with the basement occupied by them in the adjoining building; that the opening was made with the knowledge and consent of the owners of the adjoining building, who were half owners of the wall, under a permit from the inspector of buildings and in accordance with his directions and the requirements of the building laws, and with the knowledge and consent of the insurers of the building; that the opening is safely and securely made and protected, and is not an injury to the building, but a benefit and improvement to it; that according to the plaintiff's information and belief Grace knew of the opening at the time that it was being made, and knew that the basement was leased to be fitted up and used as above described, and that, whether or not this information or belief is correct, Grace was informed of the opening, leasing, fitting up, and using in October, 1892, and thereafter on November 5 and December 2, and on January 7, 1893, he accepted from the plaintiff payment of the monthly rent of \$1,000 under the lease from him to the League; that such a removal was not a breach of covenant of the lease, nor ground for a forfeiture of the same, nor for an entry by Grace to terminate the same, and that if it were Grace has waived the same by accepting rent, and is estopped to enter to terminate the lease; that if the removal or any other alteration in the building is found by the court to be a ground of forfeiture of the lease, and not to have been waived by Grace, the plaintiff is ready to restore the premises forthwith to the condition called for by the lease; and that any other alterations, if such have been made, which the plaintiff denies, were not material, and were done with the knowledge and consent of Grace, and have been waived by his acceptance of rent since receiving knowledge thereof.

The prayer of the bill was that Grace might be enjoined from entering to determine the lease; that Bradstreet and Bennett should be ordered to accept an assignment of the lease without the written consent of Grace, and to pay to the plaintiff the sum of \$5,500 therefor; and that, if the written consent of Grace was necessary to the validity of the assignment to Bradstreet and Bennett, he might be ordered to give the same.

The agreement for the purchase of the lease referred to in the bill was as follows:

"I, William D. Bradstreet, of Boston, offer five thousand six hundred dollars for the unexpired term of the lease of 181 Tremont Street, Boston, held by Henry W. Putnam, receiver of the American Protective League, remaining from and after January 1, 1893, and the following articles in rooms 32, 33, and 34, to wit: standing partitions with glass tops, rail in small room, shelving, carpets, standing desk at window facing toward Boylston Street, and large steel safe nearest Tremont Street. Said receiver to pay the taxes for 1892 and Mr. Dresser's commission. William D. Bradstreet.

"I hereby accept the above offer, subject to obtaining the assent of Mr. Grace, and of the court if necessary. Henry W. Putnam, Receiver of the American Protective League."

The written instrument referred to in the bill as Bennett's ratification of Bradstreet's purchase of the lease was as follows:

"Boston, Dec. 24, 1892. Bro. Putnam, — Your note received and contents noted. I will at once see Mr. Bradstreet and have the papers in your hands in season. It strikes me that, as the lease provides for extensive repairs which have been completed, the assent of Grace should also state that the repairs and alterations made meet his approval and are satisfactory. Lease will run to us both. Yours, Joseph Bennett."

The notice of the defendant Grace to the receiver that the terms of the lease had been violated was as follows:

"Boston, Mass., Dec. 30, 1892. Henry W. Putnam, Esq., Receiver. Dear Sir, — I am in receipt of yours of the 30th inst. I hereby notify you that the terms of my lease to the American Protective League have been violated by the removal of part of the wall between the leased premises and the adjoining estate, No. 181 Tremont Street, and by other material alterations which have been made without my knowledge or consent, and that, unless the premises are restored forthwith to the condition called for by the lease, I shall enter to determine the lease. Yours respectfully, James J. Grace."

The defendants severally demurred to the bill for want of equity, for multifariousness, and because the plaintiff had a full, adequate, and complete remedy at law.

. Hearing in the Superior Court, before *Mason*, C. J., who sustained the demurrer of the defendant Bennett, and overruled

the demurrers of the defendants Grace and Bradstreet. The plaintiff and the defendants Grace and Bradstreet appealed, and the Chief Justice reported the case for the determination of this court. The defendant Grace subsequently waived his appeal.

H. W. Putnam, pro se.

1. The plaintiff can give a clear title to the lease without the written assent of Grace. He is not affected by the covenant against assignment, being an officer of the law appointed by the court. An assignment by him is an assignment by operation of law, and is therefore not a breach of condition, and his assignee gets good title. *Smith v. Putnam*, 3 Pick. 221, 223. *Bemis v. Wilder*, 100 Mass. 446, 447, 448. *Weil v. Raymond*, 142 Mass. 206, 213. *Goring v. Warner*, 2 Eq. Cas. Abr. 100. *Weatherall v. Geering*, 12 Ves. 504, 512. *Stanhope v. Skeggs*, 2 T. R. 134, 140. *Seers v. Hind*, 1 Ves. Jr. 294. *Doe v. Bevan*, 3 M. & S. 353, 358. *Doe v. Carter*, 8 T. R. 57, 300. *Riggs v. Pursell*, 66 N. Y. 193, 201. *Jackson v. Corliss*, 7 Johns. 531. *Wood, Landl. & Ten.* § 324, and cases cited.

2. The contract does not make Grace's assent a condition unless necessary for title. The clause "if necessary" qualifies "the assent of Mr. Grace and of the Court." It did not need to be repeated after "Grace," and would not be so repeated in the ordinary use of language. It cannot grammatically qualify one without qualifying the other, and there is no reason why the parties should have intended to stipulate for the assent of Grace if unnecessary, any more than for that of the court if unnecessary. So far as this case is concerned, the proviso reads, "subject to obtaining the assent of Grace if necessary." If the suit had been brought against the receiver, he evidently could not plead the lack of Grace's assent as a defence to specific performance unless that assent was essential to title. If Grace's assent were not necessary, he could perform, and would be held to perform, and he would only be protected by the proviso if the assent were necessary. There is, therefore, complete mutuality, and the defendants are held.

3. If Grace's written consent is necessary, he is estopped to withhold it, his refusal of it is vexatious, fraudulent, and inequitable after the plaintiff has changed his position and con-

tracted to sell the lease, and equity will decree that he execute it; and consent so executed is sufficient for specific performance. *Lehmann v. McArthur*, L. R. 3 Eq. 746, 752. *Richardson v. Evans*, 3 Madd. 218. *Willmott v. Barber*, 15 Ch. D. 96, 105, 106.

E. R. Anderson, (*C. W. Bartlett* with him,) for the defendants Bradstreet and Bennett.

ALLEN, J. The material facts shown by the plaintiff's bill, briefly stated, are as follows.

The American Protective League held a lease from Grace which had twelve years to run, the annual rent being \$12,000. The lease contained a provision that the lessee should not assign it nor underlet it for any more hazardous use, etc., nor make any material alterations or additions other than those specified in the lease without the consent in writing of the lessor.

It thus appears that certain alterations were allowed, but what they were is not shown. All other material alterations were forbidden.

The American Protective League came into the hands of the plaintiff as receiver. According to the averments of the bill, the defendant Bradstreet, acting for himself and the defendant Bennett, on December 17, 1892, offered in writing to the receiver \$5,600 for the unexpired term and for certain furniture. The receiver in writing accepted this offer, "subject to obtaining the assent of Mr. Grace, and of the court if necessary." On December 24, Mr. Bennett sent to the plaintiff a note, asking Grace's approval of the alterations which had been made, and this is relied on by the plaintiff as showing Bennett's recognition that Bradstreet in signing the offer of purchase of the lease was acting for Bennett as well as for himself.

Prior to December 20, Grace had orally consented to an assignment of the lease; but on December 23, Grace told the receiver that he would not consent. On December 28 the court gave its assent to the sale of the lease by the receiver. Grace's consent in writing was never obtained. On December 30, Grace gave to the receiver formal notice that the lease had been violated by making alterations, etc. Large alterations had been made in the premises, costing \$20,000; whether these were all included in those specified in the lease does not appear;

but Grace, in his notice of December 30, specified one alteration as unauthorized, and asserts that there were others which were made without his consent or knowledge. The receiver does not allege any consent in writing by Grace, but alleges that the alterations were beneficial, and that Grace has waived them.

It would seem, from the facts stated, that Grace's consent to the assignment of the lease might be important to purchasers of it, as otherwise they might run the risk of taking a title which he could defeat.

In view of this, we must look to see what contract was made by the defendants, taking all the averments of the bill as true.

The bill need not aver that the contract was in writing, or that a memorandum in writing was made; but if it appears on the face of the bill that no written contract was made or written memorandum signed by the defendants, a demurrer will lie. *Walker v. Locke*, 5 Cush. 90. *Slack v. Black*, 109 Mass. 496. *Ahrend v. Odiorne*, 118 Mass. 261.

In this case, there is no averment of any agreement by the defendants except such as was contained in the written paper, one part of which was signed by the defendant Bradstreet, and the other by the plaintiff, on December 17. We therefore have to look to the writing alone to see what contract was made. It does not clearly appear whether the written offer of the defendants to pay \$5,600 for the unexpired term, and the written acceptance by the plaintiff, were made at the same time, and as parts of the same transaction, or not. We will therefore look at the transaction in both aspects.

First. If the defendants sent to the plaintiff an offer in writing, as a proposal on their part, and the plaintiff returned to them a writing accepting the offer, "subject to obtaining the assent of Mr. Grace, and of the court if necessary," this was not an unqualified acceptance, but it added a new term, which was a matter of substance, and a real addition. Where an offer is made by one party, and the other annexes a condition to his acceptance, there is no completed contract till the party making the first offer assents to the condition. Till that is done, their minds have not met. In the plaintiff's bill there is no averment that the defendants ever assented to the condition imposed by the plaintiff, and therefore, if the defendants' offer

and the plaintiff's acceptance on condition were separate transactions, no contract was completed.

Secondly. The other aspect is, that the offer and the acceptance were made at the same time and as one transaction; and that the form into which the parties put their contract was an offer signed by the defendants, and an acceptance signed by the plaintiff, these two together showing the contract, just as if it had been written in the form of a memorandum of an agreement whereby the defendants offered \$5,600, and the plaintiff accepted the offer subject to obtaining the assent of Grace, and of the court if necessary, both signing this memorandum at the end.

Assuming that this is the true view of the contract, we have to inquire what would be the duty and obligation of the defendants under it, since the plaintiff could not obtain the assent of Grace. Would the agreement have the effect to bind the defendants absolutely, but the plaintiff only conditionally? Would it enable the plaintiff to hold the defendants by their offer, although he was unable to fulfil the condition by which he himself would become bound? In other words, would the defendants be bound to take the lease without the assent of Grace to its assignment? It seems to us that the assent of Grace is made a condition of the contract's taking effect. The element thus introduced in connection with the plaintiff's acceptance affects the promise of each party. The contract is to become effectual provided Grace assents. It is as if the plaintiff had written, "I accept your offer, but our contract is subject to obtaining Grace's assent." The plaintiff knew that the lease which he had to assign was valueless if the conditions which it contained relative to alterations had been violated. He could not sell it so as to convey any title. Nor did the defendants wish to purchase if no title was conveyed. It is not likely that the defendants would mean to bind themselves to buy and pay for the lease without Grace's assent, if it was made known that the plaintiff would not agree to sell and assign it without such assent. See *Love v. Sortwell*, 124 Mass. 446.

This is not like the case of an option, which, when accepted, becomes binding upon both parties. Nor is it like the case of a contract which is made conditional on a future event, which has

happened, so that the contract has become mutual before either party has withdrawn. Of course a contract may spring from a proposal which is a mere offer till accepted, but which, by being accepted before it is withdrawn, becomes a complete contract. Here, the peculiarity is that the plaintiff was never bound at any moment before bringing his bill.

What has heretofore been said relates to the construction of the contract; but there is another phase of the case relating more especially to the remedy. If the form of the contract is such that the defendant has bound himself absolutely, but the plaintiff has not bound himself, a court of equity is slow to lend its aid to enforce such a contract in favor of the party who is not bound. If at the time of bringing his bill, the plaintiff was not bound to convey, a court of equity will not ordinarily compel a defendant under such circumstances to accept a title. There must be a mutuality of obligation, or the court refuses to interfere. See Beach, Eq. Jur. §§ 585-587; *Butman v. Porter*, 100 Mass. 337; *Marble Co. v. Ripley*, 10 Wall. 339, 359; *Wylson v. Dunn*, 34 Ch. D. 569, 577, 578. The consent of Grace not having been obtained, there never was a moment prior to the filing of this bill when the plaintiff was bound to assign the lease to the defendants. If it had so happened that the defendants were willing to take their chances in respect to Grace, but the plaintiff wished not to assign the lease, the defendants could not have compelled him to do so. The provision "subject to obtaining the assent of Mr. Grace" would protect him.

Under such circumstances, the plaintiff is not entitled to the assistance of a court of equity. It does not avail the plaintiff to say that Grace's consent may be compelled by a decree in this case. The question is, Were the defendants bound at the time of filing the bill to accept the title? See *Ely v. McKay*, 12 Allen, 323; Beach, Eq. Jur. § 585, and cases cited.

For these reasons, the demurrers must be

Sustained.

J. AUSTIN WILLIAMS vs. THOMAS P. SMITH.

Suffolk. January 17, 18, 1894. — May 14, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Agreement to convey Land — Statute of Frauds.

In an action for breach of an agreement to convey land to the plaintiff there was evidence of an oral offer made by the defendant on May 12, 1892, to sell the land to the plaintiff "within a reasonable time." The next day, in response to a telegram of the plaintiff that he had notified F. that "I have taken option from you of N. land," the defendant replied, in writing, on a postal card, "The land is yours if you want it." Two weeks later, on May 25 or 27, in a second interview, the plaintiff testified that the defendant "definitely concluded to sell to me. The transaction was concluded definitely. He said I could have the land for ten thousand dollars, and I agreed to take it then and there." On June 2 the defendant again wrote to the plaintiff, in substance, that he was advised by counsel that as administrator he had no authority to convey and could not give a title; that he ought not to have considered any price under \$11,000, but that he had been overpersuaded and made to say what he should not have said, and concluded, "I do not know what I can say more, but to throw myself upon your generosity." On June 17 he wrote again, saying that he had conveyed the land to a third person, and was very sorry for the whole affair, and threw himself on the generosity of the plaintiff. On July 6, in response to a letter written by the plaintiff's son on his behalf stating briefly the agreement from the plaintiff's point of view, and seeking to obtain from the defendant an admission that such were the facts of the case, the defendant wrote, "In reply to yours of July 2, will say I did say to your father that he could have the refusal of land at N. for \$10,000, for ten days." *Held*, that the plaintiff's case must rest on the oral contract, which was made at the interview on or about May 25, and that there was nothing in writing sufficient to show that the defendant entered into that contract.

If, in an action for breach of an agreement to convey land in which the answer sets up the statute of frauds, no one paper alone which is formally signed purports to express the terms of the contract, all the correspondence between the parties must be considered in order to see what the contract actually was, as shown by the writing.

CONTRACT, for breach of an agreement to convey certain land to the plaintiff.

The declaration alleged that the defendant, on or about May 25, 1892, in consideration of the plaintiff's promise to buy certain land in Newtonville, agreed to sell, and within a reasonable time thereafter to convey it to him for the sum of \$10,000; that the plaintiff was at all times ready and willing to pay the purchase price and to accept a deed of the land, but that the

defendant, in violation of his contract, subsequently, on June 16, 1892, a reasonable time for the performance of the contract not having then elapsed, sold and conveyed the land to another person, thereby preventing the performance of his contract with the plaintiff. Answer: 1st, a general denial; 2d, the statute of frauds.

Trial in the Superior Court, without a jury, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that on May 12, 1892, at an interview between the plaintiff and the defendant, the latter orally offered to sell to the former certain land in Newtonville within a reasonable time for \$10,000. Subsequently the plaintiff telegraphed to the defendant, "I have notified French that I have taken option from you of Newtonville land," and in response thereto received from him a postal card, dated May 13, 1892, saying, "Your telegram is at hand, . . . and the land is yours if you want it. Only do decide quickly as possible." The parties had a second interview at the Parker House, in Boston, at some time between May 25 and May 27, and the substance of that interview, as related by the plaintiff, was that "Smith definitely concluded to sell to me. The transaction was concluded definitely. He said I could have the land for ten thousand dollars, and I agreed to take it then and there. There was no question about the sale and purchase for ten thousand dollars of that piece of land. Mr. Smith gave me a plan of the property at the time I bought the property, at the interview of May 25 to 27."

Subsequently the plaintiff received a letter from the defendant, dated June 2, 1892, which was as follows: "I am in a fix, as it looks at this moment. My cousin is guardian for the children, and Mr. Teele, the lawyer, says, as he looks at the case, the guardian must give the title, and the administrator has not the authority. This is the way the matter stands, that I cannot give a title. The moment I talked with Mr. Page, he hustled right round and found a man who would give \$10,250, and no commission, and he is proceeding to act on this, and I suppose went to Cambridge this morning; if he carries his point before the judge, I am left. That afternoon at the Parker House, or even early the next morning, I should

have said, 'Mr. Williams, this whole matter is in the hands of Messrs. French and Fuller, and I cannot talk with you for less than \$11,000.' I did say this, over and over again, but your persuasive eloquence made me say what I should not have said, and what you would not have said had the relations been reversed. I do not know what I can say more, but to throw myself upon your generosity, and only say, write and let me know my fate."

The plaintiff received a second letter, dated June 17, 1892, which was as follows: "The deed is done. Mr. Ross has two deeds, one from me, and the other from Mr. Page. I am very, very sorry for the whole affair. I throw myself on your generosity, believing you will do by me as you would be done by."

On July 2, 1892, in order to obtain further evidence to aid in making out a memorandum sufficient to satisfy the statute of frauds, the plaintiff's son, who was an attorney in Connecticut, acting in his father's behalf, wrote to the defendant as follows: "My father has asked me to correspond with you in reference to your agreement to sell him the Newtonville land on Watertown, Walnut, and Lowell Streets, for \$10,000, and see if we cannot adjust it. You both, do you not, agree that these are the facts of the case? If so, can't the whole matter be settled amicably, and without expense to either of you?"

To this he received the following reply, dated July 6, 1892: "In reply to yours of July 2, will say, I did say to your father that he could have the refusal of land at Newtonville for \$10,000 for ten days, and the next morning, in reply to a telegram, I think, I confirmed the matter by postal. I then supposed I alone could give a title; in two or three days I found out that this could not be done. I immediately wrote to your father what the trouble was. Practically this is how the case stands at this writing, only that another party has a deed of the land from Mr. Page and myself jointly; this I presume you know. I did not receive any written notice within the ten days, or even to this day, that your father would take the land. I was in hopes that your father would think the matter too trifling to pursue. Morally, I do not feel under the slightest obligation. If you go at me through the courts, I will see what I can do to defend myself. At this writing I have not said a word to any

lawyer; I never yet have been in court, and never desire to be. I have the highest respect for your father. I believe him to be a thoroughly honest man, but it does seem to me he is straining things in this affair. Can't you prevail upon him to let it drop, and perhaps save lots of tribulation for both of us?"

The plaintiff further introduced evidence that the defendant, by deed dated June 15, 1892, as administrator of the estate of Kate Page, conveyed the land in question, acting under the license of the Probate Court, for \$10,250, to one Ross. The plaintiff also introduced evidence on the question of damages, and at the close of his case the judge ruled that the action could not be maintained, and found for the defendant. The plaintiff alleged exceptions.

E. I. Smith, for the plaintiff.

J. O. Teele, for the defendant.

ALLEN, J. The question which arises in this case under the statute of frauds is whether the contract declared on is shown by any sufficient memorandum or note thereof in writing signed by the defendant. If not, the action cannot be maintained. Pub. Sts. c. 78, § 1.

The contract declared on is an agreement made by the defendant on or about May 25, 1892, to sell to the plaintiff certain land, in consideration of the plaintiff's promise to buy the same; a mutual agreement for sale and purchase, entered into by both parties, and concluded on that day. The plaintiff testified that such a mutual agreement was orally made.

The writings signed by the defendant which are relied on to prove this agreement on his part are four in number; namely, a postal card on May 13, and letters dated respectively June 2, June 17, and July 6. The plaintiff admits that the contract is not sufficiently shown by the first three of these writings, and in order, if possible, to get further evidence, his son, who was an attorney in Connecticut, acting in his behalf, wrote to the defendant a letter, dated July 2, 1892, stating briefly the agreement according to the plaintiff's view, and seeking to get from the defendant an admission that this was a correct statement of the facts. The defendant, however, in his answer, dated July 6, stated the matter differently, as follows: "In reply to yours of July 2, will say I did say to your father that he could have the

refusal of land at Newtonville for \$10,000 for ten days." This was a mere proposal or offer. It is not the contract declared on, nor does it appear to have been relied on as a contract at the trial. The plaintiff in his testimony, indeed, said that an oral offer was made by the defendant on May 12 to sell the land "within a reasonable time." He added that he had a second interview with the defendant some time between May 25 and May 27, when the defendant "definitely concluded to sell to me. The transaction was concluded definitely. He said I could have the land for ten thousand dollars, and I agreed to take it then and there." So far as appears, no claim or suggestion was made at the second interview, or at the trial, that the defendant's previous offer was still open; and if such claim or suggestion had been made, the defendant's letter of July 6 contradicts it. The plaintiff's case, both in his declaration and in his testimony at the trial, was put upon an agreement made by the defendant on or about May 25, and not upon a previous offer by the defendant which was accepted by the plaintiff on that day.

It was not in dispute that some offer had been made by the defendant at the first interview. The postal card dated May 13, in reply to the plaintiff's telegram, shows this, though it does not show how long the offer was to remain open. The postal card was very general, and does not assume to contain any terms or details of the proposal, except merely that some offer had been made. The actual oral contract upon which the plaintiff's case must rest is that which was made at the interview on or about May 25.

In determining whether there is written proof of that contract, we may and must look at all the correspondence. Where no one paper alone, which is formally signed, purports to express the terms of the contract, all the letters that passed between them must be considered in order to see what the contract actually was as shown by the writings. *Hussey v. Horne-Payne*, 4 App. Cas. 311, 316. *Bristol, Cardiff, & Swansea Aerated Bread Co. v. Maggs*, 44 Ch. D. 616. *Bellamy v. Debenham*, 45 Ch. D. 481.

Looking at all that passed between the parties, we find nothing in writing sufficient to show that the defendant entered into the contract declared on, and testified to by the plaintiff as having been made orally.

Exceptions overruled.

WILLIAM GODDARD vs. DAVID MCINTOSH.

Suffolk. December 7, 1893. — May 15, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Obvious Risk.

At the trial of an action for personal injuries, it appeared that the plaintiff was employed in a building in process of erection where, in unloading bricks to be used in its construction, it was the practice for the defendant's teamster to stop his wagon near to the sidewalk in front of the building, and then to place planks with one end resting on the floor of the building and the other end on the floor of the wagon, making a level platform on which a man would stand while the teamster tossed the bricks from the wagon to him, who in turn tossed them to another man inside the building; that the plaintiff was familiar with this method of unloading and piling the bricks; that on the occasion of the accident he saw the teamster drive up, and noticed that he threw the reins loosely over the seat, and did not hitch or put any weight to the horses, or put a block under the wheels; and that the horses, which the defendant's agent was praising to a bystander, were fine horses and were restless, and had not been used to draw a load to that place before, and had two weeks previously been brought from the West and purchased by the defendant at auction. The plaintiff and the teamster placed the planks between the wagon and the building in the manner described, and the plaintiff went upon them and began to receive bricks from the teamster, who stood in the front part of the wagon with his back to the horses, and to toss them to the next man. While so engaged, the plaintiff was thrown down by the starting of the horses. *Held*, that the risk of such an accident was obvious, and that the plaintiff could not hold another responsible for it, when he, appreciating the danger, voluntarily placed himself where he was liable to be injured in consequence of it. KNOWLTON, J. dissenting.

TORT, for personal injuries occasioned to the plaintiff on June 2, 1890, while unloading bricks from the defendant's wagon. Trial in the Superior Court, before *Maynard*, J., who ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions, in substance as follows.

The plaintiff offered evidence tending to prove that he was employed by one Mack, who was erecting a building in Boston, as a laborer under the direction of Mack's superintendent; that the defendant brought to and delivered at the building a large number of loads of terra-cotta blocks to be used in the construction of the same; that since early in April it was the practice, when such loads were so delivered, for the defendant's

servants to drive up alongside the sidewalk in front of the building, and let each team as it came up stand in that position while the driver tossed the blocks from the wagon to Mack's men, who received them and piled them away in the building; that after the first load had been delivered the men placed planks or timbers so that one end should rest on the floor of the wagon and the other end on the floor of the building, making a level platform or walk from the bottom of the wagon to the first floor of the building, and Mack's men would stand on the planks or timbers, and the man on the plank nearest to the wagon would receive them as the driver tossed them to him, and then he would toss them to the next man, and so they would be passed along till they were delivered into the building; that this practice was continued quite a long while with no trouble or accident until June 2, 1890, when the defendant sent a load of blocks to the building in a wagon drawn by a pair of horses which had not been used to draw a load to that place before, and which had two weeks previously been brought from the West and purchased by the defendant at auction in Boston; that the horses were driven up alongside the sidewalk; that the plaintiff at this time stood on the platform nearest to the wagon and received the blocks from the driver, and in turn tossed them to another of Mack's men nearer the building; that after a few of the blocks had been taken off in that way, the horses suddenly started, throwing the plaintiff and the platform to the sidewalk; that another team was standing in front of the horses, which was driven away just before the accident, and that a large team loaded with iron was passing at the time in the street and making considerable noise; and that a great many teams were constantly passing in the street.

The plaintiff testified that "the teamster drove his team alongside of the curbstone, and threw the reins loosely over the seat. He did not hitch the horses. He did not put any weight to the horses. He did not put any blocks of wood or anything under the wheels. I saw him all the time until he commenced to pass the bricks to me, until I fell. I noticed the horses were fine gray horses. McIntosh's agent was praising them to Mr. Haniford. I noticed they were restless. I call them green horses, runaway horses. They were, sir."

The teamster had his back turned to the horses and the fore part of the wagon. He commenced at the fore part of the wagon to unload, and had unloaded about seventy bricks when the horses started. I was taking a brick this way, as I would be throwing to one of the gentlemen here (illustrating). And when I faced for the other one, the horses started and I was thrown.

On cross-examination, the plaintiff testified, "I knew of my own knowledge at the time that the teamster did not put any blocks or trigs before the wheels; I saw that he did not. I saw that he did not when he first drove up. And after I saw it, I and he put these planks on there, and then I went on there to work. And then the team started and the planks fell, and I was on the plank and fell too. I did not get the planks; McIntosh's teamsters got them. The driver threw the reins across the seat loose, or else he could not throw them on the seat. I was there when McIntosh delivered the first load of brick. I helped unload the load. The planks were used in unloading the first load. I am sure of that. The first two loads the teams did not drive up sidewise to the sidewalk. They drove along; there was no traffic in the street. They backed up endwise, and myself and these other men would go and carry them out; the horses would be out in the street; they did not unload all that way; they unloaded a few that way; when we lightened the team, they backed them up and they put those timbers on themselves; before they had lightened the team, the tail end stood to the sidewalk."

W. B. Orcutt & E. J. Jenkins, for the plaintiff.

D. C. Linscott, for the defendant.

BARKER, J. The evidence tended to show that the practice was for the teamster to stop the wagon near to the sidewalk in front of the building, while he tossed the terra-cotta blocks or bricks to the men employed in the building. This began in the early part of April, and the accident occurred on the 2d of June. After the first load, and, according to the plaintiff's own testimony, in delivering that load also, planks were placed with one end on the floor of the building and the other end on the floor of the wagon, making a level platform on which the men employed in the building would stand, and the teamster

would toss the bricks from the wagon to the man nearest on the platform, who would receive and toss them to the next, and so on until they were piled in the building. The plaintiff was one of the men employed in the building, and from the first was familiar with the whole method used in unloading and piling the bricks. On the occasion of the accident he saw the teamster drive up, and noticed that he threw the reins loosely over the seat, and that he did not hitch or put any weight to the horses, or put anything under the wheels, and that the horses were fine gray horses, which the defendant's agent was praising to one Haniford, and that they were restless. After he had noticed all this, he and the teamster put on the planks, and he went on to them and began to receive bricks from the teamster and toss them to the next man. The teamster began to unload in the front part of the wagon, and in tossing bricks to the plaintiff stood with his back to the horses. While they were so engaged, and when about seventy of the bricks had been so handled, the plaintiff was thrown by the starting of the horses.

It is plain that the risk of such an accident was obvious, and that it must have been understood and appreciated by the plaintiff. If the practice had not been one with which he was familiar, the situation was one which any one with ordinary faculties and intelligence could not fail to understand and appreciate at a glance. It was apparent that, if the horses should start, the planks on which the plaintiff stood would be displaced, and the plaintiff exposed to a fall. So far as the danger upon that particular occasion was enhanced by the facts that the horses then attached to the wagon were restless, and that they were not hitched or fastened to a weight, but left with the reins thrown loosely over the seat, and that the wheels were not blocked, the plaintiff saw and knew all these things before he and the teamster put on the planks and he went upon them to work. Knowing all these elements of the danger to which he would be exposed, he voluntarily placed himself in the situation of risk, without any inducement on the part of the defendant or of the teamster. He cannot hold the defendant responsible for sending restless horses with the wagon, or for the teamster's omission to hitch or fasten them or to block the wheels, or his throwing the reins loosely over the seat, because, knowing and appreciating

all those things before he was himself exposed to any danger in consequence of them, he then voluntarily placed himself where he was liable to injury in consequence of them.

In the opinion of a majority of the court, the order must be
Exceptions overruled.

KNOWLTON, J. I do not agree with the majority of the court in their view of this case.

On the question whether a plaintiff has a right to go to the jury, he is entitled to that interpretation of the evidence which is the most favorable possible to his claim. From the evidence reported in this case a jury might have found, on their common knowledge, that the horses ordinarily used in drawing bricks and other heavy loads in Boston are so trained and accustomed to their work that nobody deems it necessary to hitch them while occupied on or about the wagon in loading or unloading. The plaintiff was engaged in his usual way in the business in which he had daily worked in safety for about two months. There was evidence introduced by the defendant that this was the usual method of conducting the business of delivering freight at buildings in Boston. *Maynard v. Buck*, 100 Mass. 40. The jury properly might have found that, if the horses had been such as are commonly used in this kind of business, and such as the plaintiff supposed them to be, he would not have been hurt.

The plaintiff had never seen the horses until just before the accident. They had been brought to Boston from the West a few days before and sold at auction, and on this occasion they were driven to the building for the first time. From the evidence the jury might well have believed that they were spirited young horses, fresh from the prairies of the West, unaccustomed to the sights and sounds of towns or cities, and without training for such work as they were doing. In these facts alone lay the plaintiff's danger. These facts the defendant and his driver knew, or might have known. The plaintiff knew nothing of them. He had never seen or heard of the horses before. He testified to his opinion of them at the time of the trial, derived from their running away on the day of the accident, and from what he heard of them afterwards. As a part of his work at the

building he was called upon to help in unloading the wagon, and there is no evidence that he noticed the horses particularly before he took his position on the planks to receive the bricks. About seventy bricks had been taken out before the accident. The reins were thrown over the driver's seat and the driver was working in the forward part of the wagon near the seat. At some time the plaintiff noticed that "they were fine gray horses." The defendant's "agent was praising them to Mr. Haniford." But in the evidence we find no hint or suggestion that the plaintiff had any reason to suppose that they were not safe and suitable for their place except in the sentence, "I noticed they were restless." It does not appear that this restlessness continued more than a moment, or that it was considerable in degree. Certainly, according to the bill of exceptions, it was not enough to attract the attention of the driver, who was working on the wagon near the seat where the reins were. The plaintiff had a right to trust somewhat to the conduct of the driver, who was supposed to know what kind of horses he had. If he had known the history or the nature of the horses, he might well have thought his position unsafe; but the jury might properly have found that there was nothing which should lead him to think he could not safely unload the wagon in the same way as persons commonly unload such wagons drawn by other horses. It will hardly be said that his failure to get down and discontinue his work at the least appearance of restlessness of a pair of draft horses attached to a heavy load was such generally recognized carelessness as to justify the court in dealing with it judicially, and saying that it presents no question of fact for the consideration of a jury.

The rules in regard to the assumption of the risk growing out of the implied contract between master and servant do not apply to this case, for the plaintiff was not in the defendant's service, and there was no relation of contract, express or implied, between them. But applying the doctrine of the assumption of the risk in the broadest way, I do not see how it can be said, as matter of law, in any case, that one injured by a defendant's negligence is precluded from recovery on the ground that he assumed the risk of the injury, when it appears that, without fault, he was ignorant of the danger, and of the principal facts and conditions

from which the danger arose. As I understand the decisions, before he can be so precluded it must appear beyond the possibility of a finding to the contrary that he understood and appreciated the danger. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155. *Smith v. Baker*, [1891] A. C. 825.

SELECTMEN OF NORWOOD *vs.* NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Norfolk. December 7, 8, 1893. — May 15, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Abolition of Highway and Railroad Crossings at Grade — Constitutional Law.

The precise manner in which the separation of the grades of an intersecting highway and railway is to be accomplished under St. 1890, c. 428, is to be determined by the commissioners and the court, and it is unnecessary that a plan or specification showing the nature of the alterations desired should accompany or be set forth in the petition.

A petition under St. 1890, c. 428, asking "that an alteration should be made in said crossing, in the approaches thereto, in the location of said public way, and in the grades thereof, so as to avoid a crossing at grade," is broad enough to authorize a change in the place of crossing, if, after the change is made, it remains a crossing of the same street, accommodating substantially the same travel, so that it can fairly be called the same crossing removed a short distance to a new location.

The St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings," is constitutional.

Where two new crossings and two new ways proposed in substitution for one crossing at grade of a railroad and highway are each a considerable distance from the old ones, and the two new ways are each of considerable length, and are more than a fair substitute for the old way, they are more than can be ordered under a statute which, when a crossing is discontinued, authorizes new ways to be built only "in substitution therefor."

An owner of real estate abutting on a street a portion of which is discontinued in proceedings under St. 1890, c. 428, none of whose land is taken, and none of which abuts on the discontinued portion of the street, has no personal or private interest different in kind from that of other abutters on the street, and he is not entitled to appear and be heard as a party to proceedings under that statute.

The appointment by the Superior Court, upon the motion of all the original parties to proceedings under St. 1890, c. 428, for the abolition of a grade cross-

ing, of a person as one of the special commissioners who, prior to such appointment, had been an Assistant Attorney General, and as such had entered an appearance for the Attorney General as the representative of the Commonwealth, which was a party to the proceedings, is not, in the absence of evidence to show interest or prejudice, such an error as requires the report of the commission to be set aside in behalf of persons interested in the proceedings who were not originally parties.

THREE PETITIONS, under St. 1890, c. 428, for the abolition of certain grade crossings in the town of Norwood.

The first two petitions, both filed September 22, 1890, by the selectmen of the town of Norwood, alleged that Washington and Guild Streets, public ways in that town, crossed the tracks of the New York and New England Railroad Company at grade, and representing that "it is necessary for the security and convenience of the public that an alteration should be made in said crossing, in the approaches thereto, in the location of said public way, and in the grades thereof, so as to avoid a crossing at grade," prayed that a commission should be appointed as authorized by the statute. The petition with reference to the crossing of Chapel Street prayed that such alterations should be made as were necessary to avoid a crossing at grade, "or that such crossing should be discontinued, and a new way substituted therefor." The third petition, which was filed by the directors of the railroad company on November 24, 1890, asked for the abolition of the grade crossing at Railroad Avenue.

The Superior Court ordered these petitions to be consolidated and heard as one. Commissioners were appointed, who made a report, which prescribed new ways to be built under the railroad as substitutes for the grade crossings at Washington, Chapel, and Guild Streets, and ordered portions of those streets to be discontinued, and also prescribed two new crossings and two new ways, of greater width and superior construction, to be constructed in substitution for the grade crossing at Railroad Avenue, one of which was to pass over the railroad at some distance easterly of the grade crossing, while the other was to pass under it at Nahatan Street, eight hundred and fifteen feet west of Railroad Avenue, and ordered the discontinuance of that portion of the avenue included within the railroad location.

The railroad company filed objections to the report of the

commissioners, for the reason that the alterations prescribed were not warranted by law, in that they were not within the scope of the petition, nor of the statute under which it was brought, and because the new ways were not fair substitutes or equivalents for the ways then existing; that as to the crossing at Railroad Avenue, the report required the construction of two wholly distinct ways, either one of which was more than an equivalent for the way then existing, and that one of the ways was distant eight hundred and fifteen feet, and wholly disconnected, from the crossing at Railroad Avenue; that it involved an extension of Nahatan Street, and amounted to a construction of that road for the town of Norwood, ninety per cent of the expense of which the railroad company and the Commonwealth would be required to pay; that the report provided for alterations which are unnecessary, extravagant, and expensive; and that the statute under which the commissioners purported to act was unconstitutional.

One Shattuck, an owner of real estate at the corner of Washington and Chapel Streets, no part of which abutted on that part of the street which was discontinued, and none of which was taken, claimed a right to appear and be heard as a party, and also filed objections to the report of the commissioners, because one of the commissioners was not a disinterested person, but was, prior to his appointment as such commissioner, attorney of record for the Commonwealth, one of the parties to the proceedings, and as such entered an appearance therein which was not afterward withdrawn. In his objections to the report of the commissioners he says, "This objection is made to apply only to so much of said report as relates to the abolition of said grade crossings on Washington and Chapel Streets"; and his exceptions to the report, subsequently filed, relate only to the same matter.

One of the commissioners, prior to his appointment as such, when an Assistant Attorney General, entered his appearance in the case for the Commonwealth. Afterwards all the parties presented his name to the court for appointment as a commissioner, and no objection was made to him until the filing of exceptions by the railroad company to the decree confirming the report of the commissioners.

The report of the commissioners was referred to a special master to hear the parties, and to find the facts relative to the objections of the railroad company, and he subsequently reported as to the crossings ordered in substitution for the Railroad Avenue crossing, that "neither of said new crossings is a fair substitute (in the sense of being a fair equivalent) for the present grade crossing at Railroad Avenue, but both of them constitute more than a fair substitute therefor."

After a report of the findings of the special master, a decree was entered by the Superior Court confirming the report of the commissioners, and the railroad company and Shattuck alleged exceptions, and appealed.

M. Storey & F. A. Farnham, (R. F. Sturgis with them,) for the railroad company.

J. C. Lane, for Shattuck.

J. J. Feely, for the selectmen of Norwood.

KNOWLTON, J. This case comes to us on exceptions of the New York and New England Railroad Company to rulings in the Superior Court, and on an appeal by the same party, involving substantially the same questions as those raised by the bill of exceptions. There are also exceptions of one Shattuck, a landowner, who claimed a right to appear before the court and be heard as a party. There are three petitions under the statute of 1890, c. 428, two by the selectmen of Norwood, and one by the New York and New England Railroad Company, which were ordered to be consolidated and heard as one. They relate to crossings of the New York and New England Railroad Company by public highways at grade, and they severally ask that such changes may be made in the way as will avoid a crossing at grade. Commissioners were appointed by the Superior Court, a report was made by the commissioners, a special master was subsequently appointed to hear the parties and find the facts relative to certain objections made by the railroad company, and after a report of his findings a decree was entered by the court confirming the report of the commissioners.

The court rightly refused to rule that no proper petition had been filed. It is not necessary that a plan or specifications showing the nature of the alterations prayed for should accompany the petition, or that the alterations desired should be set

forth with any greater particularity or precision than was done in these petitions. The precise manner in which the separation of the grades is to be accomplished is to be determined by the commissioners and the court, and need not be set forth in the petition.

There was no error in the refusal to rule "that the commissioners' report was erroneous as matter of law, in that it required the discontinuance of an existing way in each of the three cases in question, and the building of a new way, or of new ways, in substitution therefor, which were not prayed for in said petitions, or either of them." Such changes as were made under the two petitions of the selectmen of Norwood were within the language of the statute, which was followed in the petitions. In regard to the crossing on Washington Street, and also that on Guild Street, the petitioners asked "that an alteration should be made in said crossing, in the approaches thereto, in the location of said public way, and in the grades thereof, so as to avoid a crossing at grade." We are of opinion that this language is broad enough to authorize a change in the place of crossing, if, after the change is made, it remains a crossing of the same street, accommodating substantially the same travel, so that it can fairly be called the same crossing removed a short distance to a new location. An alteration of the public way is expressly authorized, as well as an alteration of the crossing, and these provisions, taken together, considered in reference to the purpose to be accomplished, plainly imply that the location of the crossing may be changed. In many cases, the relative heights of the railroad track and of the land in the vicinity of a crossing are such as almost to require a removal of the crossing for a short distance in order conveniently to carry the way over or under the track. *Davis v. County Commissioners*, 153 Mass. 218. It would be too narrow a construction of the language of the statute to hold that there could be no change of a crossing to a new location, which should leave it substantially the same crossing and the same way. What the commissioners did under the petitions relating to these two crossings was to make a change in the location of each of the ways and of the crossings, which is apparently necessary to the construction of a way at an easy

grade under the railroad, and which does not materially affect the public travel, save as it carries it under the railroad, instead of across it at grade.

The words, "or that such crossing should be discontinued with or without building a new way in substitution therefor," (St. 1890, c. 428, § 1,) which immediately follow the language we have been considering, apply to a case where a crossing at grade is discontinued and no other crossing is provided near it, or where a crossing is discontinued and one is provided on a new way materially different from the old one in reference to its location, or the persons and travel which it is intended to accommodate, which new way may fairly be considered a substitute for the other.

It is contended that the statute under which these proceedings are had, as construed by the Superior Court, is unconstitutional. It is quite clear that a statute providing for general public improvements, to be paid for as the changes of grade are to be paid for under this statute, would be unconstitutional, as an attempt to impose taxes which would not be proportional. The cost of these changes is to be paid by the town, the railroad company, and the State, in proportions which are fixed without reference to the value of the property owned by them respectively, and without reference to the benefits which they severally receive in any particular case. This would not be a legitimate exercise of the power of taxation to meet public charges. See Const. Mass. c. 1, § 1, art. 4; *Dorgan v. Boston*, 12 Allen, 223, 235; *Merrick v. Amherst*, 12 Allen, 500; *Boylston Market Association v. Boston*, 113 Mass. 528; *Howe v. Cambridge*, 114 Mass. 388.

The validity of this statute does not depend upon the right of the Legislature to levy taxes. It was enacted rather in the exercise of the power of the Legislature to enact all needful laws to prevent accidents, and to provide as well for the convenience as the safety of the public while travelling on highways across railroads, or while being transported in the cars of the railroad companies. It would have been in the power of the Legislature in granting charters to railroad corporations to provide that the railroad should not be constructed across a public highway without carrying the highway over or under the railroad, and

that all the expenses of changing the grade of the way and constructing the approaches to the railroad should be borne by the railroad corporation. If, by an increase in the amount of travel at a grade crossing, or of the number of trains running over the railroad, or by changes in the manner of running trains, or of the modes of travel on a highway, or if by reason of any other change of circumstances the Legislature should deem it best for the public interest that a grade crossing should be abolished, it would be within the constitutional authority of the Legislature to forbid the continuance of it, and to require the railroad company to pay the whole, or any part, of the cost of making the change. *Roxbury v. Boston & Providence Railroad*, 6 Cush. 424. *Commonwealth v. Eastern Railroad*, 103 Mass. 254. *Mayor, &c. of Worcester v. Norwich & Worcester Railroad*, 109 Mass. 103. *In re Mayor, &c. of Northampton*, 158 Mass. 299. *New York & New England Railroad v. Bristol*, 14 Sup. Ct. Rep. 437. *New York & New England Railroad's appeal*, 58 Conn. 582, and 62 Conn. 527. *Boston & Maine Railroad v. County Commissioners*, 79 Maine, 386. *State v. Wabash, St. Louis, & Pacific Railway*, 83 Mo. 144. This it might do in the exercise of the police power for the protection of the people, and its decision in regard to what is right and proper in each particular case, or in any class of cases, would not be subject to revision by any other tribunal. This would not be taking from the railroad company, its property or any vested right. It would be merely prescribing in the interest of the public the mode of constructing its road.

Of the power to prescribe such regulations for railroad corporations, there can be no doubt. These corporations are creatures of the State engaged in doing a public business, and are bound by any reasonable statutes for the regulation of this business which the Legislature chooses to enact. *Attorney General v. Boston & Albany Railroad*, 160 Mass. 62. *Parker v. Metropolitan Railroad*, 109 Mass. 506. *Chicago, Burlington, & Quincy Railroad v. Iowa*, 94 U. S. 155. *Budd v. New York*, 143 U. S. 517. *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 179.

The reservation of the right of amendment, alteration, or repeal of all charters subsequently issued, which was secured by the statute of 1831, c. 81, and by later statutes of similar im-

port, makes it clear, if there could be any doubt without this provision, that the Legislature can now by an amendment of the corporate charter require anything that it properly could have required in the original construction of the railroad to make it safe for the passage across it of travellers on highways. This is a reservation of the right to legislate in regard to corporations and their management in any reasonable way, although it does not authorize the Legislature to deprive them of their property or of vested rights without compensation. The doctrine applicable to it was expressed by Chief Justice Waite in the *Sinking Fund cases*, 99 U. S. 700, 721, in these words: "Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment." See also *Portland & Rochester Railroad v. Deering*, 78 Maine, 61; *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446; *Holyoke Co. v. Lyman*, 15 Wall. 500; and the Massachusetts cases above cited.

If the statute arbitrarily put upon railroads the expense or part of the expense of general improvements in the system of highways of a city or town not fairly incidental to changes in the crossing at the railroad, it would be beyond the power of the Legislature to enact it. The railroad can properly be charged with expenses incurred in adapting the public ways and the railroads to each other in such a manner as best to promote the safety and convenience of all the people. To do this may in particular cases involve changes extending a considerable distance from the railroad. Whether such a change is within the power of the Legislature to make at the expense of the railroad company is to be determined by the requirements of public convenience and necessity, having reference to the interests of the railroad company as well as those of all the people who have occasion to cross the railroad. Whatever is incidental to a reasonable change in the mode of crossing may be included in the work for which the corporation may be charged under the statute. This may include not only a change in an existing crossing which does not destroy the identity of the crossing, but also the abolition of the crossing and the substitution of another for it on a new way, if the substitution provides no more than a fair

equivalent for that which is given up. *Davis v. County Commissioners*, 153 Mass. 218. The fact that in making the changes in this case some of the new ways and approaches to the crossing are to be wrought to a greater width than the old ones, and to be of a superior construction, is not, under the findings, a good ground of objection to the proceedings of the commissioners. The work involved in the changes should be done in a proper manner.

In one particular we think there was error on the part of the commissioners and of the court. In substitution for the grade crossing at Railroad Avenue they provide for two crossings and the construction of two new ways, each of which is a considerable distance from the old one. The master finds that "neither of said new crossings is a fair substitute (in the sense of being a fair equivalent) for the present grade crossing at Railroad Avenue, but both of them constitute more than a fair substitute therefor." There is nothing in the report of the commissioners that tends to contradict or control this finding of the master, but the facts disclosed show almost conclusively that the finding is correct. We must assume, therefore, that the rulings and the decree of the Superior Court were made upon this finding of fact in connection with the other facts which appear in the reports, and the question is whether they were correct as matter of law.

It may be that the plan adopted by the commissioners is the best that could be devised for the accommodation of the public travel in this vicinity, but we are of opinion that the two crossings, involving as they do the construction of two new ways of considerable length, are more than can be ordered under a statute which, when a crossing is discontinued, authorizes new ways to be built only "in substitution therefor." It is unnecessary to decide that in no case could two new ways and two crossings be ordered under the statute in substitution for a discontinued way and crossing. Perhaps cases may be supposed where such a construction would be only a reasonable substitute and fair equivalent for that which is given up, but ordinarily a single new way and crossing are all that can be considered necessary or reasonable as a substitute for a discontinued crossing. It is to be remembered that a railroad corporation can only be liable as an ordinary tax-payer for the cost of construction of new ways which

are not necessary to accommodate the travel that is to be provided for at the crossing which is changed. In the present case the two ways and crossings seem to be intended, in part at least, as an improvement of the general means of communication in the neighborhood, as distinguished from a provision for the better accommodation of those who have occasion to pass over the railroad at the existing crossing. We must, therefore, set aside that part of the report which pertains to the change of the crossing at Railroad Avenue. The remainder of the report, which pertains to the crossings at Washington, Chapel, and Guild Streets, is separable from this, and should be confirmed.

Except in regard to Railroad Avenue, as above set forth, we find no error of law in the proceedings of the commissioners, or of the special master, or of the Superior Court.

The exceptions filed by Shattuck relate to matters in regard to which he had no right to be heard as a party. In his objections to the report of the commissioners he says: "This objection is made to apply only to so much of said report as relates to the abolition of said grade crossings on Washington and Chapel Streets"; and his exceptions to the report subsequently filed relate only to the same matter. He was the owner of certain real estate at the corner of Washington and Chapel Streets, but no part of it is taken, and it does not abut on that part of the street which is discontinued. He has no personal or private interest different in kind from that of other abutters on the street, and under the decision in *Chandler v. Railroad Commissioners*, 141 Mass. 208, he was not entitled to appear in court, or before the special master, and be heard as a party on the question whether the report should be confirmed.

The fact that he was the owner of land on Guild Street, a part of which was taken, is immaterial, inasmuch as he made no objection to the proceedings affecting that street. Whether, if he had objected to the change in that street, he would have been entitled to be heard as a party objecting to the confirmation of the report, it is unnecessary to decide.

He has brought to the attention of the court the fact that one of the commissioners, when an Assistant Attorney General, entered his appearance in the case for the Commonwealth. This does not show such an error as requires us to set aside the report

in behalf of persons interested in the proceedings who were not originally parties. All the parties presented the name of this person to the court for appointment as a commissioner, and no objection was made to the proceedings on account of his acting until the filing of the exceptions. He had been a public officer, and as such had entered an appearance for the Attorney General as the representative of the Commonwealth. The presentation of his name by all parties interested, and his appointment by the court, indicate that he was then found to be disinterested and unbiased. In the absence of evidence to show interest or prejudice, we must assume that he acted impartially.

The exceptions in regard to so much of the report as relates to the crossings on Washington, Chapel, and Guild Streets are overruled, and that part of the report is confirmed. In the opinion of a majority of the court, the exceptions in regard to Railroad Avenue should be sustained, and that part of the report which relates to the crossing of that avenue should be set aside.

Decree accordingly.

GEORGE McALISTER & others vs. BENJAMIN F. BURGESS,
executor, & another.

Suffolk. January 19, 1894. — May 15, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Charitable Bequest.

A bequest "to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of the city of B. and vicinity," is a valid bequest to a public charity.

BILL IN EQUITY, filed February 24, 1893, by certain of the next of kin of Jane D. Royce, to have a bequest of the residue of her property "to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of the city of Boston and vicinity," declared void as indefinite and uncertain, and as creating a trust contrary to the rule against perpetuities, and to have the executor directed to pay the residuary fund to

the next of kin of the testatrix, in accordance with the statute of distributions. The executor demurred to the bill, on the ground that the bequest was valid, and that the next of kin had no right to claim the fund as undevise property.

Hearing on the bill and demurrer before *Knowlton, J.*, who reserved the case for the consideration of the full court. The facts appear in the opinion.

D. C. Linscott, for the executor and the Evangelical Baptist Benevolent and Missionary Society.

R. M. Morse & C. E. Hellier, for the next of kin.

BARKER, J. By the residuary clause of her will the testatrix gives property, which is said to be about twenty thousand dollars in value, "to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of the city of Boston and vicinity." The respondent corporation of that name was chartered by St. 1857, c. 154, "for the purpose of securing the constant maintenance in said Boston of evangelical preaching for the young and the destitute, with free seats; for the employment of colporteur and missionary laborers in Boston and elsewhere; for the purpose of providing suitable central apartments to other and kindred benevolent and missionary societies; and for the general purpose of ministering to the spiritual wants of the needy and destitute." The bill is brought by the next of kin of the testatrix, who contend that the residuary clause is void, because creating a trust contrary to the rule against perpetuities, and because the clause is so indefinite and uncertain that its provisions cannot be carried out, and they ask that the executor be directed to pay the residuary fund to the next of kin of the testatrix, in accordance with the laws of distribution. The Attorney General has been made a party, and by his answer contends that a valid public charity was created by the clause quoted. The Evangelical Baptist Benevolent and Missionary Society contends that the clause gives it the residue of the estate as an absolute gift, adding that, if it shall be decided that the gift was not absolute, but in trust for the benefit of poor churches in Boston and vicinity, it will accept and administer the trust, and contends that in either construction of the clause the bequest is valid. The executor takes no position upon the question whether the gift is absolute or in trust, but demurs on the ground that

the bequest is a valid one, and that the next of kin have no right to claim the fund as undeviseed property.

A gift of property, to be lawfully applied for the benefit of an indefinite number of persons by bringing their minds or hearts under the influence of religion, is a charity, in the legal sense, within the terms of the definition given in *Jackson v. Phillips*, 14 Allen, 539, 556. As held in *Baker v. Fales*, 16 Mass. 488, 495, "The very term church imports an organization for religious purposes; and property given to it *eo nomine*, in the absence of all declaration of trust or use, must by necessary implication be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God." It follows that the legitimate use by a church of property so given must result in its application for the benefit of those who attend upon or are within the sphere of the influence of the services of the church, by bringing them under the influence of religion. It is a matter of common knowledge, that the individuals who attend the services of any particular church are not limited to the members of that church, but are an indefinite and varying number of persons; and there can be no question that an indefinite number of persons are constantly benefited by having their minds and hearts brought under the influence of religion by poor churches of the city of Boston and vicinity. Grants and donations both of real and personal estate may consistently with existing laws be made to churches, and provision is made by the statute law for the manner in which such grants and donations shall be held. Pub. Sts. c. 39, §§ 1-3. There seems to be no reason, therefore, why a gift of property to one or more churches should not be held a charitable gift, and none why, if it is given in trust, the trust should not be held a trust for a public charity, and not subject to the rule of law against perpetuities.

The plaintiffs contend, however, that it is settled by a course of decisions that in this Commonwealth a church is a voluntary association of such a nature that a gift for its benefit cannot be upheld as a public charity, and they cite as authority for this contention the cases of *Attorney General v. Federal Street Meeting-House*, 3 Gray, 1; *Attorney General v. Trinity Church*, 9 Allen, 422; *Attorney General v. Old South Society*, 13 Allen, 474; and *Old South Society v. Crocker*, 119 Mass. 1. In none

of these cases, however, was it contended that the gifts or devises were void. In the first of these cases the property which the Attorney General contended was held as a public charity was not the property of a church, but of the proprietors of a meeting-house, nor was it the proceeds of a gift, but of a purchase for full consideration. In the second case there was a gift by devise of land to the rector and church wardens of King's Chapel and their successors in office, upon several distinct trusts, one of which was to pay a stated yearly sum forever to the church, another to pay a yearly sum for the support of a course of sermons to be preached in the church building during every Lent; and another to pay a fixed sum yearly at the door of the church building on certain days in Lent for the use of the poor, by way of a contribution. The second and third of these gifts were held to be clearly of the nature of public charities; but the first was not held void, and the reason why the information or bill was dismissed was because there had been no failure in the due execution of the trusts, and no occasion existed for the intervention of the court. The practical result of the decision was, that a church held for its own use a large surplus coming from the devised property, and not needed to execute the specific public charitable trusts created by the will. The case is, therefore, an authority in favor of the validity of gifts for a church, as well those for its own use as those which are clearly public charities. In *Attorney General v. Old South Society*, 13 Allen, 474, no question of the validity of a gift to a church, or in trust for the benefit of a church, was raised or considered, and the only doctrine there held which may be considered as at all bearing upon the present case was that the sacramental contributions of the society, which was not a church but a religious corporation, were not impressed with the character of a public charity.

In *Old South Society v. Crocker*, 119 Mass. 1, the two conveyances by Madame Norton were not to a church, but to certain persons named and their associates, and the purpose of the conveyance was not for general church purposes, but for the erection of a meeting-house and of a dwelling for the minister, while her devise, although to the "Third Church of Christ in Boston," was not for the general purposes of the church, but "for the use of the ministry in the said church successively forever." While

it was held that no public charity was created by the deeds or the devise, it was also held that a trust not obnoxious to the rule of law against perpetuities was created by them. The case is certainly not an authority for the position that a gift for the benefit of a church, *simpliciter*, is not a public charity, and is an authority that a devise to a church for the use of the ministry in the church forever is a good devise. In our opinion, a gift to a church, without restrictions as to the use to be made of the property, is a gift to be applied for the promotion of public worship and of religious instruction, which must necessarily influence other than church members, and, if in trust, has all the elements of a public charity.

If, as contended by the Evangelical Baptist Benevolent and Missionary Society, the gift is not in trust, but is an absolute one to that corporation, there can be, of course, no question of its validity on the ground that it is obnoxious to the rule against perpetuities. It is not now necessary to decide whether the gift is absolute or in trust. That question depends upon whether the testatrix used the words "for the benefit of poor churches of the city of Boston and vicinity" as a further description to identify the legatee, or a direction to the legatee to use in a particular branch of its work a fund which she gave to it absolutely, or meant that the bequest was to be used only for the benefit of the churches indicated.

Nor, in our opinion, is the gift, whether absolute or conditional, void for uncertainty. It is not contended by the plaintiffs that there are no poor churches in Boston and vicinity, and we see no more practical difficulty in ascertaining the beneficiaries if the bequest is a trust, than in the case of poor persons, or of deserving charitable institutions, while the territorial designation is sufficiently exact. See *Jackson v. Phillips*, 14 Allen, 539, 597; *Sears v. Chapman*, 158 Mass. 400. It is not necessary now to decide whether, if the bequest is in trust for poor churches of Boston and vicinity, it is a permanent trust, or one which could properly be executed by an immediate distribution of the whole fund. All that we now decide is that the bequest, however it may be construed, is a valid one, and that the next of kin of the testatrix have no right to have the residuary fund of which it disposes distributed to them as intestate property.

Demurrer sustained, and bill dismissed, with costs.

JESSE E. AMES & another, assignees, vs. PATRICK A.
SHEEHAN.

Suffolk. January 24, 1894. — May 15, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

*Recovery of Property of Insolvent Debtor taken on Execution procured by him
in Fraud of Creditors.*

An assignee in insolvency cannot maintain a bill in equity against a judgment creditor of the insolvent debtor, to recover the value of property of the insolvent taken on execution to satisfy a judgment obtained against him on a promissory note given without consideration prior to the institution of proceedings in insolvency with a view to giving a preference, but his remedy is by an action at law under Pub. Sta. c. 157, § 96.

BILL IN EQUITY, filed August 8, 1893, by the assignees in insolvency of the joint and separate estates of David D. and Irving W. Snow, insolvent debtors, to vacate a judgment and to recover from the judgment creditor the value of property taken on an execution on a judgment obtained by him against the insolvents on promissory notes given by them without consideration prior to the institution of proceedings in insolvency with a view to giving a preference.

The bill alleged that the plaintiffs were the assignees in insolvency of the joint and separate estate of David D. and Irving W. Snow, copartners, who were, on June 16, 1893, adjudged insolvent debtors; that prior to the institution of proceedings in insolvency the insolvents, with intent to defraud their creditors, made four promissory notes without consideration payable to the order of the defendant; and that the defendant, participating in the fraudulent purpose of the insolvents to defraud their creditors, on May 13, 1893, brought actions on the notes against the insolvents, on which, on June 2, 1893, judgments against them amounting in the aggregate with interest and costs to \$3,840.88 were obtained by default, and on June 5 executions were levied upon the stock in trade and fixtures of the insolvents, the same sold at auction, and the proceeds thereof applied in part satisfaction of the judgments. The prayer of the bill was that the judgments so obtained might be vacated, the levy set aside, and

the execution recalled; that the notes upon which the judgments were obtained be cancelled and delivered up to the plaintiffs; and that the defendant be ordered to pay to the plaintiffs the value of the property upon which he levied by virtue of the executions obtained by him.

The defendant demurred to the bill, and assigned as grounds of demurrer want of equity; that this court had no jurisdiction to grant the relief prayed for; that the plaintiffs' remedy, if any, is by a petition for review; and that the plaintiffs had a full, adequate, and complete remedy at law.

At the hearing the demurrer was sustained, and the bill dismissed; and the plaintiffs appealed.

W. B. French, for the plaintiffs.

J. H. Blanchard, for the defendant.

BARKER, J. Assuming that the facts stated in the bill are true, the plaintiffs have a plain, adequate, and complete remedy under the provisions of Pub. Sts. c. 157, § 96, to recover from the defendant the value of the property which he has caused to be taken and sold on the executions. Upon those facts the insolvents procured the property to be attached and seized on executions, with the view that it should thereby become the property of the defendant, and thus be put beyond the reach of their genuine creditors so as to defraud them. Before procuring the property to be attached the insolvents gave to the defendant four promissory notes without consideration, and when the attachments were made it was in suits upon these notes, which were then held by the defendant. His possession of these notes, although they were without consideration, constituted him a person who had a claim against the insolvents, within the meaning of the language of Pub. Sts. c. 157, § 96; and the intention of the insolvents that he should become the owner of the property by means of the attachments and subsequent levies was "a view to give a preference" within the meaning of the same section. On the part of the defendant, the only inference from the facts alleged is that he knew that the makers of the false notes were insolvent, and that the whole transaction was in fraud of the insolvent laws. The result is that the demurrer must be sustained and the bill dismissed.

So ordered.

CAROLINE C. PRATT vs. DAVID J. PRATT.

Norfolk. March 2, 1894. — May 15, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Set-off of Homestead Estate — Effect of Devise in Lieu of Dower on Homestead Rights — Effect of Widow's Absence from Homestead.

A person, having from a time prior to 1840 owned land on which was a single house built for one family and having but one front door, acquired an estate of homestead therein. From 1852 until his death in 1889 he, with his wife, lived in one half of the house, while his son, with his family, lived in the other half, but the cellar, hallways, stairs, some rooms in the second story, and the barn were used by them in common. *Held*, that he had an estate of homestead in the entire estate.

The right of homestead is a freehold estate for the life of the husband, and for such further time after his death as his widow shall continue to occupy the homestead, which cannot be affected by the will of the husband.

A widow of a person having an estate of homestead, who, on the day after the funeral of her husband, being of advanced age and ill, unwillingly leaves the homestead estate, and lives for two months with neighbors, but who leaves various articles of furniture and household goods on the premises, intending to return, although in fact she never does, is not thereby deprived of her right to have an estate of homestead set off to her.

PETITION to have an estate of homestead set off from an estate in Weymouth, under the Pub. Sts. c. 128.

Hearing in the Superior Court without a jury, before *Hopkins, J.*, who found for the petitioner, and ordered partition as prayed for, and, at the request of the respondent, reported the case for the determination of this court in substance as follows.

David Pratt, the husband of the petitioner and the father of the respondent, was, from a period prior to 1840 until his death in 1889, the owner of premises in Weymouth which contained a single house built for one family and having but one front door. From 1852 until the filing of this petition, David J. Pratt, the respondent, with his family, had been allowed to live in the northerly half of the house, while his father, David Pratt, and the petitioner lived in the southerly half, but the cellar, hallways, stairs, some rooms in the second story, and the barn were used in common. By the seventh

clause of his will, David Pratt devised to the petitioner, "instead of dower, the use and income of that part of my dwelling-house, barn, outbuildings, and land . . . which have been recently occupied by me, and not by my son, David J. Pratt, to hold during her life." By the eighth clause he devised to the respondent all of his real estate in fee, subject to the above recited occupancy and use by the petitioner.

On the day after the funeral of David Pratt, the petitioner, being of advanced age and ill, unwillingly left the premises, and was taken in and cared for by her neighbors for one or two months. During her absence she left various articles of furniture and household goods in the open hall chamber of the second story, in the cellar, barn, and dairy, and at the filing of the petition had not removed them; but the larger portion of her furniture, which the respondent in her absence and without her consent had removed from her part of the house to his, she subsequently took from the premises. When the petitioner left the premises she intended to return, but never did so. She boarded at various places in the vicinity, and let the portion of the premises formerly occupied by her and David Pratt to different tenants.

J. W. McAnarney, for the respondent.

C. R. Clapp & H. N. Glover, Jr., for the petitioner.

LATHROP, J. It is conceded that David Pratt, the husband of the petitioner, had, at the time of his death in 1889, an estate of homestead, acquired under the St. of 1855, c. 238, which continued under the St. of 1857, c. 298, § 18, the Gen. Sts. c. 104, § 3, and the Pub. Sts. c. 123, § 3. The extent of this estate is in controversy. From a time prior to 1840 down to his death he was the owner of the premises described in the petition. The house was a single one, with one front door, and was built for one family. Since 1852, his son, the respondent, with his family, was allowed to live in a portion of the house, which may be described in general terms as the northerly half of the house, while David Pratt and the petitioner lived in the southerly half; the cellar, hallways, stairs, some rooms in the second story, and the barn being used in common. On these facts, we are of opinion that David Pratt had an estate of homestead in the entire estate.

If the part of the house in question had been rented to the respondent, the case would be on all fours with that of *Mercier v. Chace*, 11 Allen, 194. It does not appear whether the respondent paid rent or not; but we do not think that it makes any difference whether he was a tenant, or was merely allowed by his father to live there. See also *Lazell v. Lazell*, 8 Allen, 575.

The right of homestead which was thus acquired was a freehold estate for the life of the husband, and for such further time as his widow should continue to occupy the homestead. The husband could not affect it by his will. *Brettun v. Fox*, 100 Mass. 234. In this case the husband, who died possessed of a homestead estate consisting of a dwelling-house and land, by his will gave to his wife, the petitioner, an estate for life in one undivided third of the same, and the remainder in fee to his son, from whom the respondent derived his title; and the petitioner did not within six months waive the provisions of the will. It was held that the petitioner was entitled to have an estate of homestead set off to her.

It is provided by the Pub. Sts. c. 123, § 8, that "the estate of homestead existing at the death of a householder shall continue for the benefit of his widow and minor children, and shall be held and enjoyed by them, if some one of them occupies the premises." The fact that the petitioner left the premises the day after the funeral of her husband, and her continued absence, under the circumstances set forth in the report, do not deprive her of her right to maintain this petition. *Brettun v. Fox*, *Lazell v. Lazell*, and *Mercier v. Chace*, *ubi supra*. In *Paul v. Paul*, 136 Mass. 286, relied upon by the respondent, the widow left the homestead estate with the intention of not returning, having built another house. In the case at bar it is found that she intended to return.

According to the terms of the report, there must be
Judgment for the petitioner.

ROCKPORT WATER COMPANY vs. INHABITANTS OF ROCKPORT
& others.

Suffolk. March 13, 1894. — May 15, 1894.

Present. FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Water Company — Taking of Franchise — Payment not a Condition Precedent to a Taking by Town — Remedy for Recovery of Price — Constitutional Law.

Under St. 1893, c. 281, authorizing a town to take by purchase or otherwise the franchise or corporate property of a water company "on payment to said corporation of the actual cost of its franchise, works," etc., payment is not a condition precedent to the taking, and the water company cannot maintain a bill in equity to enjoin the town, after the taking and before payment, from preventing the laying of water pipes by the company.

HOLMES, J. This is a bill in equity to enjoin the defendants from preventing the plaintiff's laying down water pipes under its charter. The defendant town has voted unanimously to take the plaintiff's franchise and property, and intends to prevent the plaintiff from going on with its work. It has not paid or tendered any sum of money as the price, and the plaintiff has not stated the amount of its claim.

By § 7 of the plaintiff's charter, (St. 1893, c. 281,) the town has the right to take, by purchase or otherwise, the plaintiff's franchise and corporate property "on payment to said corporation of the actual cost of its franchise, works," etc. It will be seen that the franchise by the very terms of its creation is subject to compulsory purchase, and that there is no question of the constitutionality of a proceeding in accordance with the charter which the plaintiff was content to accept. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 486. The only question is what the charter requires.

The strength of the plaintiff's argument is, that the words quoted make payment a condition precedent to the taking, and that therefore until payment the defendant has no right to intermeddle. *Sands v. M' Clelan*, 6 Cowen, 582. *Paynter v. James*, L. R. 2 C. P. 348, 354. But the considerations on the other side seem to us stronger than the effect of the words "on payment."

The word "on" does not always make a condition precedent. *Dodd v. Ponsford*, 6 C. B. (N. S.) 324. *Dana v. Gill*, 5 J. J. Marsh. 242, 243, 244. As in the Braintree case, the town has the right to make a binding bargain by its own act alone. As was decided in that case, the act which makes the bargain is a two-thirds vote. The time of the vote purports to be the time of the purchase. If the actual cost which the town is required to pay is not to be estimated up to that moment, it is hard to fix any other. By § 7 the interest to be paid is to be reckoned to the date of the purchase or taking, which most naturally would be construed as meaning the date of the vote which makes the binding bargain. If the taking by the town was not complete when the vote was passed, then, in case of a dispute as to what was the actual cost, the town's right to proceed with the works, or to use them, would be suspended until the cost could be ascertained by a proceeding in court. On the other hand, it is for the plaintiff's advantage to regard the title as passing by the vote, so as to give it a right to the price at once. Otherwise it would be left to the action of the town, or to such remedy as it might have for a neglect to carry out the bargain within a reasonable time. This seems to us the view fairest to both parties. Apart from the fact that the liability of the franchisee to be taken in this way is inherent in it by the terms of its creation, the security for payment is sufficient. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50, 54. If the town should delay payment wrongfully, no doubt it might be enjoined from further interference. See *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, 397; *Woodbury v. Marblehead Water Co.* 145 Mass. 509, 511. It follows that the plaintiff had no right to do further work after the town vote was passed.

The present bill is not founded upon delay in payment or the need of security to the plaintiff, but upon a different view from that which we take of its rights until payment. The proper and sufficient remedy to recover the price under the statute is an action of contract, if the parties cannot agree upon the figures.

Bill dismissed.

J. F. Simmons & H. H. Pratt, for the plaintiff.

W. H. Moody & S. D. York, for the defendants.

COMMONWEALTH vs. CURTIS WARREN & others.

Suffolk. March 26, 1894. — May 15, 1894.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Gaming-house — Being Present where Gaming Implements are found.

At the trial of a complaint under the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, for being present in a common gaming-house when gaming implements were found there, it appeared that the building in question was protected with a thick oak door with brass trimmings having on the inside an oak bar fitted into staples attached to the door-case on each side of the door; that officers were unable to gain admittance by knocking, and attempted unsuccessfully to break down the door with a sledge-hammer; that some one inside pushed aside a slide covering a hole in the door and looked out, and after some delay the door was opened, and the defendants were found in a room of the building, walking about; that from this room a stairway enclosed in a solid board partition led to a room above; and that between the ceiling of the lower room and the floor of the upper room were found concealed gaming implements, including cards and a deal box used in playing faro. Access to the place of concealment was obtained by removing the riser of the top step of the stairway, which was fastened by a catch. Some one was heard running up the stairway while the officers were trying to enter the building, and after they had entered one of the defendants came down the stairway. It also appeared that faro is a game played with playing cards for money. *Held*, that there was abundant evidence that the building in question was a common gaming-house.

Although the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, and the statute in regard to nuisances, Pub. Sts. c. 101, § 8, make it necessary to prove that a building is resorted to for the purpose of gaming, it is unnecessary to prove the offence charged by direct evidence that on numerous occasions persons resorted to the house for this purpose, but the evidence may be circumstantial, or the facts disclosed may be sufficient to indicate that the place was one used as a place of resort for the purpose named.

In the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, authorizing the arrest of "all persons present, whether engaged in playing or not, if the implements of gaming are found in said place," the word "place" refers to the house or building which the warrant authorizes the officers to enter, and is not confined to the room where such persons are found when arrested.

LATHROP, J. The defendants, five in number, have been convicted, under the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, of being present in a common gaming-house when gaming implements were found there. At their trial they asked for three instructions. 1. That there was no evidence that the building described in the complaint was unlawfully used

as and for a common gaming-house, for the purpose of gaming for money or other property. 2. That there was no evidence that idle or dissolute or other persons resorted to the premises for that purpose. 3. That there was no evidence that the defendants were present in a place where implements of gaming were found.

1. There was abundant evidence that the building in question was a common gaming-house. It was protected by a thick oak door with brass trimmings, which had on the inside an oak bar which fitted into staples attached to the door-case on each side of the door. The officers who visited the building were unable to gain admittance by knocking. They then attempted to break down the door with a sledge-hammer, but failed. Some one inside pushed aside a slide covering a hole in the door and looked out. After some delay, one of the defendants opened the door, and the defendants were found in a room of the building, walking about. From this room was a stairway, enclosed in a solid board partition, leading to a room above. Between the ceiling of the lower room and the floor of the room above were found concealed gaming implements, including cards and a deal box used in playing faro. Access to the place of concealment was obtained by removing the riser of the top step of the stairway, which was fastened by a catch. Some one was heard running up this stairway while the officers were trying to enter the building, and after the officers entered one of the defendants came down this stairway. There was also evidence that faro is a game played for money, and that it is played with cards similar to those found. See *Commonwealth v. Adams*, 160 Mass. 310.

2. There can be no doubt at the present day that the keeping of a common gaming-house is an indictable offence at common law. *The King v. Rogier*, 2 Dowl. & Ry. 431, 1 B. & C. 272. *The King v. Taylor*, 3 B. & C. 502. *Jenks v. Turpin*, 13 Q. B. D. 505, 514, 515. But this was once doubted, and it is perhaps for this reason that the statute now before us, which was first passed in 1834, (St. 1834, c. 172,) and the statute in regard to nuisances, (Pub. Sts. c. 101, § 6,) which goes back to 1855, (St. 1855, c. 405, § 1,) instead of declaring a common gaming-house to be a common nuisance, make it necessary to prove that the building is resorted to for the purpose of gaming. But there is

no necessity of proving the offence charged by direct evidence that on numerous occasions persons resorted to the house for this purpose. The evidence may be circumstantial, or the facts disclosed may be sufficient to indicate that the place was one used as a place of resort for the purpose named. *Commonwealth v. Lambert*, 12 Allen, 177. *Commonwealth v. Coolidge*, 138 Mass. 198.

In the case at bar we cannot say, as matter of law, that there was no evidence which would have warranted the jury in finding that persons resorted to the house for the purpose of gaming for money, although there was no direct evidence in regard to the house or its frequenters previously to the night when the defendants were arrested.

3. The statute authorizes the arrest of "all persons present, whether engaged in playing or not, if the implements of gaming are found in said place." The word "place" clearly refers to the "house or building" which the warrant authorizes the officers to enter, and is not confined to the room where such persons are found when arrested. *Exceptions overruled.*

O. A. Galvin, for the defendants.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

**THOMAS J. MANEY vs. PROVIDENCE AND WORCESTER
RAILROAD COMPANY.**

THOMAS F. MATHEWS vs. SAME.

Worcester. March 2, 1894. — May 16, 1894.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Real Action — Adverse User — Statute.

The St. of 1861, c. 100, entitled "An Act defining the rights of owners or occupants of land adjoining railroads," applies only to the location of the railroad corporation, and not to land acquired by purchase adjoining the location.

TWO WRITS OF ENTRY, dated February 7, 1893, to recover two parcels of land in Worcester. Pleas, *nul disseisin*.

The cases were submitted to the Superior Court, and, after judgment for the demandants, to this court, on appeal, on agreed facts, in substance as follows.

In 1846, one Goddard owned the land described in the writs, and the lands adjacent thereto. In that year he conveyed to the tenant a tract which was described in part as "running as now staked out for said railroad company, and measuring six rods from the centre line of said stakes on the easterly side and four rods on the westerly side, said company to erect a good and sufficient fence on both sides of said piece of land and forever maintain the same." In June, 1847, the tenant filed its location for a railroad, "being two and one half rods on each side of the centre line of said road, which was the same line described as the centre line in the Goddard deed to the tenant, and the westerly line of this location was the easterly line described in the deeds of the demandants."

Very soon after this the tenant entered upon the land described in its location, and erected along the line thereof, two and one half rods westerly of the centre line, a wooden fence of rails and posts, parts of which still remain.

The demanded premises, to wit, the space one and one half rods wide westerly of the fence and between it and the westerly line of the Goddard conveyance to the tenant, were included in a conveyance of about nine acres of land from Goddard to one Chase, made on August 31, 1847, which included also all the above described land of the demandants.

The demanded premises were entered upon, cultivated, and occupied under claim of title by Chase immediately after this conveyance to him, and occupied and improved as farming land, and later subdivided into building lots, by him and his successors in title, including the present demandants, openly, exclusively, and uninterruptedly from that date until about the 1st of January, 1890, when the tenant entered upon the premises and dispossessed the demandants.

The demanded premises, from 1847 to the time when the land was built upon and since, were cultivated up to the fence erected by the tenant in that year. The tenant in 1880 surveyed its estate, and put stakes on its line as now claimed at each end, without otherwise disturbing the demandants' oc-

cupation and without their knowledge or consent, the demandants never having heard of this survey until after their suits were brought.

The taxes on the lots of land respectively demanded were assessed to the demandants and their predecessors in title, and were paid by them from 1847 to 1890 without the knowledge of the tenant. In 1890 and thereafter the tenant was assessed for the taxes, and paid them.

The demandants and their predecessors in title had no actual notice of the claim of the tenant to the demanded premises until the receipt of a letter in 1889 from the tenant's superintendent.

W. A. Gile, for the tenant.

J. R. Thayer & A. P. Rugg, for the demandants.

LATHROP, J. The principal question which arises in these cases is as to the construction of the St. of 1861, c. 100, which reads as follows; "If the owner or occupant of any land adjoining any railroad in this Commonwealth, has taken or shall take into his inclosure, any part of the land belonging to said railroad, as located and established, or has erected or shall erect any building upon, or has occupied or shall occupy for the purposes of cultivation or otherwise, any land belonging to or included within the location of any such railroad, no continuance of such inclosure, building, or length of possession or occupancy of the land belonging to such railroad, so inclosed or occupied, shall create in such adjoining owner or occupant, or in any person claiming under him, any right to the land belonging to such railroad so inclosed or occupied."

This statute has been before the court in three cases, but in none of them was the question now before us involved. *Fisher v. New York & New England Railroad*, 135 Mass. 107. *Turner v. Fitchburg Railroad*, 145 Mass. 438. *Littlefield v. Boston & Albany Railroad*, 146 Mass. 268.

The tenant contends that this statute applies not only to land included within the location of a railroad, but also to land acquired by purchase lying adjacent to the location. The meaning of the statute is not free from doubt. The words "as located and established" plainly refer to the land included within the location which the railroad corporation has the right

to take by the right of eminent domain. The clause "or shall occupy for the purposes of cultivation or otherwise, any land belonging to or included within the location of any such railroad" may be read so as to apply either to the location or to any land belonging to the railroad. Thus, if commas should be inserted after the words "to" and "within," the meaning would be plain that the land to which the statute was intended to apply was that within the location, although the words "belonging to" would be superfluous. On the other hand, if commas were inserted after the words "to" and "of," the meaning would be equally plain that the statute applied to any land of the railroad, if the word "railroad" is equivalent to railroad corporation; and this is the construction contended for by the tenant.

In citing the act at length, we have followed the punctuation contained in the Acts and Resolves. In the Supplement to the General Statutes, prepared by Mr. Richardson and Mr. Sanger, and published by the Commonwealth, commas are inserted after the words "to" and "within," and an examination of the original act at the State House shows that their punctuation in this respect follows that of the original act.

If, however, we disregard the punctuation, (*Cushing v. Worrick*, 9 Gray, 382, and *Martin v. Gleason*, 139 Mass. 183,) the more natural and obvious meaning seems to us to be that the words used apply only to the location.

In the last clause, the words "the land belonging to such railroad" must refer to the land before mentioned.

In 1874, the general laws relating to railroads were not only consolidated, but revised, as the title to the act shows. St. 1874, c. 372. By § 182, the St. of 1861, c. 100, and other acts, were expressly repealed; but by § 183 the repeal did not affect "any act done, or any right accruing, accrued, or established." As the demandants' rights had already accrued, they were not affected by the passage of the act.

The tenant contends that § 107 is to be considered as a legislative interpretation of the St. of 1861, c. 100. This section reads as follows: "No length of possession or occupancy of land belonging to a railroad corporation, by an owner or occupier of adjoining land shall create any right to such land of the corpo-

ration in such adjoining owner or occupier, or any person claiming under him." See also Pub. Sts. c. 112, § 215. If the St. of 1874 were merely a consolidation of existing acts, there might be some force in the tenant's argument; but as it was also a revision of the laws, we are of opinion that, as this section of the St. of 1874, is so different from the St. of 1861, it can have no effect in interpreting the St. of 1861.

The judgments rendered in the Superior Court for the demandants must be

Affirmed.

EPHRAIM B. STILLINGS vs. JOHN YOUNG & another, trustees.

Suffolk. March 2, 1894. — May 16, 1894.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ

Scire Facias — Trustee Process — Debt due to Copartnership.

The fact that a person charged as trustee is indebted to the defendant and another jointly as copartners is not matter of abatement to be pleaded by the alleged trustee in the original action, but may be pleaded in answer to a *scire facias* against him.

A person from whom money is due to a copartnership is not chargeable as trustee in an action against one of the partners.

SCIRE FACIAS on a judgment against one Turner and the defendants as trustees. Writ dated August 25, 1891. At the hearing in the Superior Court, before *Thompson, J.*, it appeared that the plaintiff on the first Monday of June, 1891, recovered judgment against one Turner, and that thereafter the defendants were adjudged trustees. On June 17 execution issued against Turner and the defendants as his trustees, and payment thereof having been demanded of Turner and the defendant Glass, and by them refused, it was on August 15 returned into court unsatisfied.

The defendants requested the judge to rule, that upon the evidence the action had been prematurely brought, and could not be maintained; that the answer and sworn statement of the defendants must be regarded as true, and could not be con-

tradicted by the plaintiff; and that upon the evidence, as set forth in their answer, the goods, effects, and credits in the hands of the defendants belonged to the firm composed of Turner and one Rideout, copartners, and could not be attached by the plaintiff as the goods, effects, and credits of Turner alone.

The judge declined to rule as requested, and ordered judgment for the plaintiff; and the defendants alleged exceptions.

A. M. Lyman, for the defendants.

H. L. Baker, for the plaintiff.

BARKER, J. The exceptions must be sustained because the answer of the defendants, that the money owing from them to Turner was due to him and one Rideout as copartners, was one which the defendants could make, and which must be regarded as true. Pub. Sts. c. 183, § 53. *Varian v. New England Mutual Accident Association*, 156 Mass. 1, 3, and cases cited. *Bostwick v. Bass*, 99 Mass. 469. That the debt was due to Turner and Rideout jointly as copartners was not matter of abatement, to be pleaded by the alleged trustees in the original action. They were not chargeable as trustees of Turner in respect of the debt due to his copartnership. *Hawes v. Waltham*, 18 Pick. 451. *Bulfinch v. Winchenbach*, 3 Allen, 161.

Exceptions sustained.

WALTER S. SAMPSON & another vs. CITY OF BOSTON.

Suffolk. March 6, 1894. — May 16, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Action — Contract of Indemnity by Public Officers not within the Scope of their Authority.

Commissioners to make preliminary plans for the erection of a new court-house for the county of Suffolk were appointed by the mayor of the city of Boston, under the authority of an order of the city council approved March 4, 1885, which provided that the commissioners should "incur no liability for or in behalf of the city unless specially authorized so to do by the city council." The St. 1885, c. 377, as amended by St. 1886, c. 122, authorized the same commissioners to proceed with the erection of such court-house, and they, acting under the authority so conferred, made a contract in writing with the plaintiffs for the laying of the brickwork and masonry of a portion or section of such

structure. Subsequently, the commissioners, acting on behalf of the city of Boston, but, so far as appeared, without the authority of the city council, with a view to hastening the work and to making uniform progress in the construction of the different sections of the structure upon which contractors other than the plaintiffs might be employed, entered into an agreement with the plaintiffs, whereby, in consideration of their abandoning the derricks which they had provided, and of their using in place thereof the "Norcross derricks," so called, the city should at its own expense construct the Norcross derricks, under the direction of the commissioners, and be responsible for their safe construction and erection, and should hold the plaintiffs harmless against any loss or damage which they might suffer by reason of any defect in the construction or any negligence in the erection of the derricks so long as the city should continue to own them. The Norcross derricks were afterwards erected by the city, and while in use by the plaintiffs pursuant to the agreement, and while they remained the property of the city, by reason of their improper construction and erection, fell and injured a workman employed by the plaintiffs. The workman subsequently recovered judgment against the plaintiffs for damages, which they were compelled to pay, and thereupon they brought an action on the agreement against the city of Boston to recover back the sum so paid by them. *Held*, that the action could not be maintained.

CONTRACT. The declaration alleged that, by the authority of an order of the city council of the city of Boston, approved March 4, 1885, three commissioners were appointed by the mayor to make preliminary arrangements for the erection of a new court-house for the county of Suffolk; that by St. 1885, c. 377, as amended by St. 1886, c. 122, the commissioners so appointed were authorized, subject to the approval of the mayor of the city, to take land for such purpose, and, acting for the city of Boston, within a reasonable time to erect thereon a suitable court-house, work not to be begun, however, until proposals for doing the work should be received, and until contracts with satisfactory guaranties for their performance should be made; that pursuant to the acts so specified the commissioners took land, and advertised for proposals for the erection of the court-house, such proposals to be for doing different parts of the work separately and in different sections; that the plaintiffs made proposals to the commissioners for doing the stone and brick mason-work, at different times, upon different and separate sections of the work; that the proposals were accepted, and contracts were entered into in writing between the commissioners and the plaintiffs accordingly, and that the plaintiffs have executed the contracts in part, and are still engaged in the performance of the same; that under the contracts all the work of

construction was to be done under the direction and control and subject to the approval of the commissioners, and of a supervising architect appointed by them ; that when they entered upon the work they had a complete and sufficient outfit of tools, machinery, and appliances for its performance, including an ample supply of suitable derricks ; that thereafter, to facilitate the general work of construction, and to enable the contractors who from time to time might be engaged in such construction on different parts of the building to carry on the work with uniformity, and to make substantially equal progress in raising all parts of the building, the commissioners and the supervising architect proposed to construct a system of derricks known as the "Norcross derricks," such derricks to be constructed at the expense of the city of Boston, and to be its property unless and until they should be purchased by such contractors ; that the contractors were requested by the commissioners and architect to abandon their own derricks, and to adopt and use in common with other contractors the system so to be constructed ; that thereupon it was agreed by the plaintiffs and the city of Boston, acting through the commissioners and the supervising architect, that the use of the plaintiffs' derricks should be abandoned and that the system of "Norcross derricks" should be constructed and set up for use by the city, and that the plaintiffs should use the same in the performance of their contracts instead of their own ; that such change was made, and such agreement entered into wholly for the benefit of the city, and not for the convenience or advantage of the plaintiffs, and in consideration thereof it was understood and agreed between the plaintiffs and the commissioners and architect that the Norcross derricks should be constructed under the direction of the commissioners and the architect ; that the same should be set up for use by them, and that the city should be responsible for their proper construction, and for setting them up properly and securely, so that they could be used by the plaintiffs with safety to themselves and their employees and without detriment to their work, and in consideration of the plaintiffs consenting to abandon the use of their own derricks, and to use the derricks supplied by the city, the city through its commissioners and the supervising architect undertook and agreed to hold the plaintiffs harmless

against all loss or damage to which they might be subjected by reason of any defect in the construction of the Norcross derricks, or any negligence or carelessness in setting them up for use, so long as the city should continue to own them; that prior to November 9, 1887, the city of Boston, acting through the commissioners and the supervising architect, pursuant to the agreement, caused four derricks of the character described to be constructed and set up upon certain sections of the court-house then in process of construction by the plaintiffs, and so connected them with one another and with two previously set up on another section by guy ropes and otherwise as to form a connected system over the entire work; that the plaintiffs did nothing toward their construction or setting up, but that the same was done wholly by the city, pursuant to its agreement with the plaintiffs; that on November 9, 1887, the plaintiffs were informed by the city, through the commissioners and architect, that the derricks were ready and safe for use, and they were directed to proceed to use them in the further construction of the court-house; that on that day one of the derricks so erected fell, and by reason of its connection with the others caused the whole system to fall; that the derrick which fell was improperly constructed, and improperly, negligently, and carelessly set up by the city, whereby and solely in consequence whereof, and not through any fault of the plaintiffs, the fall was caused; and that the improper construction and negligent setting up of the derrick and its defective condition were unknown to the plaintiffs, and were not, by the use of due care, discoverable by them before or after they began to use it.

The declaration further alleged that, while the plaintiffs were using the derrick in the performance of their contract, on November 9, 1887, one Gardella, who was employed by them, was struck by the falling derrick and badly injured; that thereafter, in an action brought against the plaintiffs to recover for such injuries, Gardella recovered judgment for a large sum, to wit, \$6,358.72, which judgment the plaintiffs were compelled to pay, together with the sum of one thousand dollars which they were compelled to pay in defence of that action; and that the plaintiffs have demanded reimbursement and payment to them of the sums so paid, but the defendant has refused to pay them any-

thing, wherefore, as they allege, the defendant owes them the sum of \$7,858.72.

The order of the city council of the city of Boston referred to in the declaration was as follows: "In Common Council, Jan. 29, 1885. Ordered, That his Honor the Mayor be, and he is hereby, authorized to appoint three citizens of Boston as commissioners for and in behalf of the city, to make all preliminary arrangements for the erection of a new court-house for Suffolk County, including the preparation of plans and estimates of the cost thereof; to confer with the proper officers of the Commonwealth in relation to the co-operation of the Commonwealth with the city in that behalf; to obtain additional legislation, if necessary, to enable the city to acquire additional land for such building; and from time to time to report their action to the city council with such recommendations as shall seem to them expedient. The compensation of such commissioners shall be fixed by the Mayor, and said commissioners may employ such clerical or other assistance as may be needed; provided, however, that the expense of said commission shall not exceed the sum of five thousand dollars for the present municipal year; and provided further, that the said commissioners shall incur no liability for or in behalf of the city unless specially authorized so to do by the city council."

The defendant demurred to the declaration, and assigned as grounds thereof, that the declaration set forth no cause of action; that neither the commissioners nor the architect were the agents of the defendant, and that they had no authority to enter into any agreement in behalf of the defendant, or to bind it by any agreement in regard to the derricks; and that there was no privity of contract between Gardella and the defendant, or any liability on its part to him, in respect of any of the matters alleged in the declaration.

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiffs appealed to this court.

J. O. Teele, for the plaintiffs.

R. W. Nason, for the defendant.

HOLMES, J. The contract set out in the declaration is alleged to have been made on behalf of the city of Boston by the com-

missioners referred to, and therefore can bind the city only so far as the commissioners had authority to bind it. The order authorizing the appointment of the commissioners expressly provides that they shall incur no liability for or in behalf of the city unless specially authorized so to do by the city council. The city council is not alleged to have authorized the commissioners to incur the liability sought to be enforced, if the city council could have done so, and therefore the authority, if any, must be found in the later statutes referred to in the declaration.

The important act is St. 1885, c. 377. The first section authorizes the commissioners to take land subject to the approval of the mayor; the third makes it the duty of the city, acting by and through the commissioners, to erect a suitable courthouse upon the land taken. No other authority is given. It will be seen that the service which the city is required to perform through the commissioners is one which, in the language of *Hafford v. New Bedford*, 16 Gray, 297, 302, "it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." If the commissioners had undertaken to construct the building, instead of contracting for its construction, clearly the city would not have been answerable in tort for an accident like the one in question, upon well established principles. *Hill v. Boston*, 122 Mass. 344. *Tindley v. Salem*, 187 Mass. 171, 174. *Howland v. Maynard*, 159 Mass. 434. We are of opinion that the commissioners were not given authority to make the city answerable by contract.

Apart from the anomaly which there would be if an agent had the power to impose such a liability indirectly when he could not do it directly, there is another consideration peculiar to this case. We assume that the commissioners had power to bind the city to pay the price of the work to be done, within the limit fixed by § 3, but no other power is given them expressly by the words of the statute. The statute recognizes the order appointing them, and proceeds on the footing that that is the source of their agency. § 1. Therefore the statute should not be taken to remove the limits set upon their powers by the order, as we have stated, any further than is expressed. Many contracts can be imagined which in one or another set of circum-

stances it would be convenient to make, in aid of the principal contract for the construction of the building. Whether any of them would be within the power of the commissioners we need not consider. Some at least would not be, and we are of opinion that the present one is on the wrong side of the line, apart from the rather remote possibility that it might require an expenditure of more than the sum mentioned in § 3 and St. 1886, c. 122, § 2.

Demurrer sustained.

JEREMIAH CAREW & another vs. SAMUEL STUBBS & another.

Suffolk. March 6, 1894. — May 16, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Mechanic's Lien — Motion to recommit Assessor's Report.

A motion to recommit a report to an assessor is addressed to the discretion of the court, and a decision thereon is not a subject of appeal to this court. If a party desires the findings of an assessor to be reviewed by the Superior Court he should take specific exceptions to the assessor's findings, and request so much of the evidence to be reported as bears upon the points covered by the exceptions; and any questions of law raised thereon can be brought to this court.

LATHROP, J. This is a petition, under the Pub. Sts. c. 191, to enforce a mechanic's lien. After the decision reported in 155 Mass. 549, the case was sent to an assessor by the Superior Court, in accordance with an agreement of the parties. The assessor heard the parties and made his report to the court. The respondent Nathaniel M. Jewett, who purchased the premises at a sale made by the mortgagee, filed a motion that the report of the assessor be recommitted to him for a report of all the evidence and facts agreed in the case, and of the rulings asked for by the respondent Jewett. The petitioners filed a motion that the report of the assessor be accepted, and judgment be entered in the case, and that the court order a sale of the property covered by the liens of the petitioners, and that a warrant issue therefor. The court ordered that the report of the assessor be confirmed, and that judgment upon the report

and a decree of sale be entered. From this the respondent Jewett appealed to this court.

Following the report of the assessor is what is headed "Prayers of defendant to assessor for ruling," and which begins thus: "On the whole evidence only nominal damages can be found for either of the petitioners." Certain reasons are then set forth, all of which contain statements relating to the evidence, which is not before us. The rule to the assessor did not require him to report the evidence. He did not report it; and the court, when the matter was called to its attention, did not require him to do so.

1. The motion to recommit the report to the assessor was addressed to the discretion of the court, and is not a subject of appeal to this court. *Kendall v. Weaver*, 1 Allen, 277. *Monk v. Beal*, 2 Allen, 585. *Packard v. Reynolds*, 100 Mass. 153. *Butterworth v. Western Assurance Co.* 132 Mass. 489.

2. If the respondent Jewett desired the findings of the assessor to be reviewed by the Superior Court, he should have taken specific exceptions to the assessor's findings, and have requested so much of the evidence to be reported as bore upon the points covered by the exceptions. *Paddock v. Commercial Ins Co.* 104 Mass. 521, 531. See also *Heebner v. Eagle Ins. Co.* 10 Gray, 131, 139. If this had been done, and any questions of law had been raised, these questions could have been brought to this court; but on the record before us no such questions appear.

Judgment affirmed.

G. W. Estabrook, for the respondent Jewett.

A. H. Russell, for the petitioner Carew.

E. J. Hadley, for the other petitioners.

EDWARD G. CHENEY vs. MIDDLESEX COMPANY.

Suffolk. March 7, 1894. — May 16, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Due Care — Negligence.

The plaintiff, a boy eighteen years of age, while in the employ of the defendant, was injured by reason of his hand being caught in the gearing of a spinning machine called a mule. He was, so far as appeared, a person of ordinary intelligence, who had attended the high school and had for a considerable time before the accident worked on spinning machines. Where the plaintiff worked there were two mules about thirty or thirty-five feet long standing back to back with an alley-way two and a half feet wide between them. In the centre of each mule was a gearing which operated the front part of the mule, called the carriage, and did the spinning. This was protected by a framework consisting of uprights and an arm which prevented the gearing from being seen. While the plaintiff was passing through the alley-way with one hand in front of him and the other behind him, a way in which he considered it safe and proper to carry his hands, he heard an outcry, turned quickly around, and dropped one of his hands, which was caught in the gearing. There was apparently no occasion for his going into the alley-way, for he testified that the work which he went in there to perform could be done from the front if the machine was stopped, but that he desired to save time by not stopping the machine, so as to make more money. *Held*, that assuming that the plaintiff was properly in the alley-way, and in the exercise of due care, there was no evidence of negligence on the part of the defendant, and that the plaintiff was not entitled to recover.

LATHROP, J. This is an action at common law, for personal injuries sustained by the plaintiff while in the employ of the defendant, by reason of his hand being caught in the gearing of a spinning machine, called a mule. At the close of the evidence, the court directed a verdict for the defendant; and the case comes before us on the plaintiff's exception to this ruling.

The plaintiff was eighteen years of age, and had for a considerable time before the accident worked on spinning machines. He had attended school, and was in the Lowell High School when he went to work for the defendant. There is nothing to show that he was not a person of ordinary intelligence. On going to work for the defendant, he was in the picker room for three days, and was then set to work in the mule room, and on the fourth day of his working there was injured. There were two mules, each about thirty or thirty-five feet long, which

stood with their backs to each other, there being an alley-way two and a half feet wide between them. In the centre of each mule was an arrangement of gearing which operated the front part of the mule, called the carriage, and did the spinning. This gearing was protected by a framework, consisting of uprights and an arm, which prevented the gearing from being seen. While the plaintiff was passing through the alley-way, with one hand in front of him and the other behind him, because, as he testified, he considered it a safe and proper way to carry them, he heard some one cry out, turned quickly round, dropped one of his hands, and it was caught in the gearing.

There does not appear to have been any occasion for the plaintiff to go into the alley-way. While he testified that it was necessary to go there in order to get the spools ready for the operation called doffing, that is, taking off one set of spools and putting on another, he also testified that the doffing could be done from the front by stopping the machine; and he gave as his reason for going into the alley-way to do this work, that he saved the time while the machine would be stopped, and so would make more money.

But if we assume that the plaintiff was properly in the alley-way, and in the exercise of due care, we are of opinion that the plaintiff is not entitled to recover. We fail to find any evidence of negligence on the part of the defendant. There is nothing in the bill of exceptions which discloses any imperfection in the machine. The plaintiff's contention is that he should have been instructed that the gearing was there. But while he testified that he did not know that the gearing was there, he also testified that he supposed there was gearing there in connection with the machine, and that he knew that if his finger got into the gearing it would be a dangerous thing. Supposing that there was danger, he placed his hands in the position above described; and he testified that he thought his hand would not have been caught if they had been kept in that position. The accident does not appear to have been caused by any want of instruction, but by the plaintiff's attention being diverted by an outcry, for which the defendant is not responsible. See *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Pratt v. Prouty*, 153 Mass. 333; *Tinkham v. Sawyer*, 153 Mass. 485; *De Souza v. Stafford Mills*,

155 Mass. 476; *Downey v. Sawyer*, 157 Mass. 418; *Richstain v. Washington Mills*, 157 Mass. 538; *Rooney v. Sewall & Day Cordage Co.*, ante, 153. *Exceptions overruled.*

T. O'Toole, (*J. F. McDonald* with him,) for the plaintiff.

P. Webster, for the defendant.

ELIZABETH S. WEBSTER, administratrix, vs. FITCHBURG
RAILROAD COMPANY.

Suffolk. March 8, 1894. — May 16, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Passenger.

A person who is struck and killed while running very rapidly from the direction of a public street in S. across the premises of a railroad corporation, outside of the passenger station, and across a track on which is an approaching train, apparently with a view to taking another train which is about to start for B. on the track beyond, is not a passenger for whose death an action can be maintained under Pub. Sts. c. 112, § 212, although at the time of his death he had in his pocket a ten-trip ticket which entitled him to ride over the railroad between B. and the station in S. where the accident occurred.

TORT, under Pub. Sts. c. 112, § 212, by the administratrix of William Webster, for causing his death.

Trial in the Superior Court, before *Maynard, J.*, who ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions, in substance as follows.

The intestate lived in Somerville, and was in the daily habit of taking the 8.40 A. M. train at the Union Square station of the defendant's railroad for Boston. On the morning of December 12, 1889, while the 8.40 train was standing at the station receiving passengers, the intestate immediately before he was struck and killed was running very rapidly from the direction of a public street across the defendant's premises outside the passenger station, and across the outward track toward the train, which was standing on the inward track; and while crossing the outward track he was struck by a west-bound train which

was scheduled to stop at the Union Square station at 8.42 A. M., and received the injuries which caused his death. At the time of the accident he had in his pocket a ten-trip ticket, stamped December 9, 1889, which entitled him to ride over the defendant's railroad between Boston and the Union Square station, where the accident occurred.

S. H. Tyng, for the plaintiff.

G. A. Torrey, for the defendant.

KNOWLTON, J. At the trial the plaintiff relied solely on her count under Pub. Sts. c. 112, § 212, in which she alleged that her intestate was a passenger on the defendant's railroad, and the only question in the case is whether there was evidence to warrant the jury in finding that he was a passenger. He had in his pocket a ten-trip ticket, which entitled him to ride over the defendant's railroad between Boston and the station in Somerville where the accident happened, and immediately before he was struck and killed he was running very rapidly from the direction of the public street across the defendant's premises outside of the passenger station to a track on which was an incoming train, apparently with a view to take another train which was about to start for Boston on the track beyond. It is contended, in behalf of the plaintiff, that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises in a place designed for the use of passengers outside of the station, and was about to take a train, he had become a passenger.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready

to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In *Dodge v. Boston & Bangor Steamship Co.* 148 Mass. 207, it was said: "When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger.

In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present and speaking by a representative who saw him, there was no instant when the answer to his request would not have been, "We will not accept you as a passenger while you are exposing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way."

The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case. *Dodge v. Boston & Bangor Steamship Co.*,

ubi supra. *Merrill v. Eastern Railroad*, 139 Mass. 238. *Commonwealth v. Boston & Maine Railroad*, 129 Mass. 500. *Warren v. Fitchburg Railroad*, 8 Allen, 227. *Baltimore Traction Co. v. State*, 28 Atl. Rep. 397. *Exceptions overruled.*

THEODORE P. DRESSER *vs.* WILLIAM O. CUTTER & others.

Suffolk. March 8, 1894. — May 16, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Liability of Obligors on Bond to dissolve Attachment after Judgment vacated.

The liability of obligors on a bond given to dissolve an attachment ceases when the original judgment is vacated upon petition for review under Pub. Sta. c. 187, §§ 17-20.

HOLMES, J. The question in this case is whether a bond given to dissolve an attachment binds the obligors to satisfy a judgment rendered after the original judgment has been vacated upon petition under Pub. Sta. c. 187, §§ 17-20. It is provided in terms by § 20 that no attachment made or bail taken in the suit shall be liable to satisfy such a judgment. By § 19 a bond covering all that the original security does is to be given before the first judgment is vacated. There is no ground of policy for making a distinction between bonds to dissolve attachments and other securities for the satisfaction of judgment, and in *Bush v. Hovey*, 124 Mass. 217, 218, it was laid down unhesitatingly by Chief Justice Gray, that, when the original judgment was vacated, the liability of the obligors on the bond previously given to dissolve the attachment ceased.

The language of § 20, corresponding to St. 1875, c. 33, follows as closely as may be that of the earlier statute embodied in § 30, as to attachment and bail when a writ of review is granted. Gen. Sta. c. 146, § 29. Rev. Sta. c. 99, § 12. The section of the Revised Statutes, suggested by St. 1791, c. 17, § 1, is said by the commissioners to be in accordance with the established practice, and to be proposed

mostly to prevent or remove doubts. Unquestionably, whether necessary or not, that section would be construed to apply to bonds like the present. The construction is made the easier by remembering that attachment originally was a process merely to compel the appearance of the defendants, that the mode of dissolving it was by giving special bail, and that bonds to dissolve attachments have been said to be, in effect, merely special bail. *Drake, Attachment*, §§ 1 *et seq.*, 312. *Andrews v. Clarke*, Carth. 25, 26. *Harris v. Mountjoy*, 2 Leon. 178. *Ashley, Attachment*, (2d ed.) 6, 7. *Brandon, Foreign Attachment*, 104, 106. *Gillaspie v. Clark*, 1 Tenn. 2. *Garrett v. Tinnen*, 7 How. (Miss.) 465. *Childress v. Fowler*, 9 Ark. 159, 170. See *Marshall v. Hosmer*, 4 Mass. 60. We are of opinion that § 20 must be construed to apply to bonds given to dissolve attachments, and that the defendants are not liable.

Judgment for defendants.

E. B. Powers, (*W. H. Cobb* with him,) for the defendants.

W. Clifford, for the plaintiff.

DANIEL A. LYNCH vs. FAYETTE F. FORBES.

SAME vs. INHABITANTS OF BROOKLINE.

Norfolk. December 13, 14, 1893. — May 17, 1894.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

*Water Works — Eminent Domain — Necessity of Taking — Constitutional Law
— Pleading — Demurrer.*

There is no constitutional right on the part of landowners in this State to have the question of the necessity or expediency of the taking of land for a public use in any particular instance submitted to a court or jury, and in the absence of any provision in the statutes submitting the matter to a court or jury the decision of the question lies with the body or individuals to whom the State has delegated the authority to take.

Where one of the articles in a warrant for a town meeting is "to appropriate money for land for the extension of our water supply and to authorize the treasurer to borrow the same," and the town votes that "such land shall be purchased or taken for extension of the water supply of the town as the selectmen and water board for the time being shall decide to be for the best interests

of the town," it is not necessary that the town should subsequently designate the specific land to be taken, or that it should formally ratify what has been done by the selectmen and water board.

Under St. 1872, c. 343, § 4, which was incorporated by reference into St. 1888, c. 181, expressly providing that the town of B. might exercise the "rights, powers, and authorities" given to it by the act "in such manner and by such commissions, officers, agents, and servants as said town shall from time to time choose, ordain, appoint, and direct," the town properly could delegate the power of taking land for a public use to the selectmen and water board, and the taking when completed by them became the act of the town.

An averment in a bill in equity, brought to restrain a town from taking the land of the plaintiff for the purpose of increasing its water supply, that the town had previously taken all the land that it was authorized to take, is a conclusion of law, and not such an allegation of fact as would be admitted by the defendant's demurrer.

TWO CASES. The first case was an action of tort for trespass *quare clausum fregit*. Writ dated December 20, 1890.

Trial in the Superior Court, before *Dewey, J.*, who directed a verdict for the defendant, and, at the request of the parties, reported the case for the determination of this court, in substance as follows.

The plaintiff proved his title to a parcel of land in Dedham, and the trespass alleged to have been committed thereon, and rested.

The defendant then offered evidence tending to prove that he was superintendent and engineer of the water works of the town of Brookline, acting under the direction of the selectmen and water board of the town; that in October, 1890, in the performance of his duties, he entered upon the land of the plaintiff, which was a part of the land taken by the town of Brookline on April 26, 1890, pursuant to St. 1872, c. 343, and St. 1888, c. 181, authorizing it to take land for the erection and maintenance of its water works, and surveyed the same, and set up thereon certain stone bounds which acts constituted the alleged trespass. The defendant proved the acceptance by the town of the statutes above mentioned, and introduced in evidence a vote passed at a town meeting held on April 28, 1890, — under an article in the warrant "to appropriate money for land for the extension of our water supply, and to authorize the treasurer to borrow the same," — "that such land shall be purchased or taken for extension of the water supply of the town as the

selectmen and water board for the time being shall decide to be for the best interests of the town, and that the sum of \$20,000 be, and the same is hereby, appropriated to pay for the land so purchased or taken." On April 26, 1890, the selectmen and the water-board of Brookline took the land of the plaintiff, and on June 24, 1890, the taking was recorded in the registry of deeds for the county of Norfolk.

The plaintiff thereupon offered evidence tending to prove that in 1874 the town of Brookline took land in West Roxbury containing about seven and one fourth acres, and constructed thereon a water gallery, and erected water works by means of which water was drawn from Charles River and supplied to the town of Brookline and its inhabitants; that in 1875 it took about twenty-three and one third acres of land adjoining that previously taken, and that the land thus taken and held was all the land necessary and proper for the erection and maintenance of pumping stations, pipes, aqueducts, and other water works necessary and proper for conveying water from the Charles River to the town of Brookline, and for all other purposes mentioned in the act of 1872; and that on February 7, November 7, December 30, 1889, and on April 26, 1890, the town took sundry other parcels of land in Needham and Dedham, containing in all about two hundred and ninety-five acres, among the parcels of land last taken being that of the plaintiff.

The plaintiff further offered to show, by expert testimony, that his land was not necessary or useful for the purpose of laying or maintaining aqueducts or pipes, constructing or maintaining reservoirs, or such other works as were necessary or proper for raising, forcing, retaining, distributing, discharging, or disposing of the water which the town was authorized to take from the Charles River, or for any purpose within the authority given by the acts of 1872 and 1888. He further offered to show that the town of Brookline had laid a pipe across the Charles River from its pumping station on the Boston side to the land taken in Dedham on February 7, 1889, and that it had sunk many wells in the land, and was drawing from them a supply of water, and that from a part of the wells, at least, the water so drawn

was not obtained from the river by percolation or otherwise. This evidence was excluded.

The plaintiff requested that the question whether the town of Brookline had exceeded its authority under the statutes be submitted to the jury, either under general instructions as to the scope and purpose of the authority given to the town under the statutes, or by special issues framed by the judge. He further contended that the defendant had failed to show that the town had complied with the formal requirements of the statute for taking land.

The judge declined to give the ruling requested, and ruled that the question as to whether the town had exceeded its authority and taken more land than it was authorized to take, or any land not within the authority given by the acts of the Legislature, could not be tested in this proceeding; that the defendant had shown that the town had conformed to the formal requirements of the statute as to the method of taking land, and that the defendant's justification was complete.

If the rulings were right, judgment was to be entered for the defendant on the verdict; otherwise a new trial was to be ordered.

THE SECOND CASE was a bill in equity, filed June 3, 1893, to remove a cloud upon the title to the land of the plaintiff.

The bill alleged that the plaintiff was the owner in fee simple of certain tracts of land in Dedham; that on June 24, 1890, the defendant filed in the registry of deeds for the county of Norfolk an instrument in writing by which it took, or claimed to take, as of April 26, 1890, for the extension of its water supply, pursuant to St. 1872, c. 343, and St. 1888, c. 131, certain parcels of land in Dedham, among them being the land belonging to the plaintiff; that by St. 1872, c. 343, the defendant was authorized to take, hold, and convey into and through it for its use and the use of its inhabitants water from the Charles River, and to take any lands or real estate necessary for laying pipes and aqueducts and maintaining the same, constructing and maintaining reservoirs, or such other works as may be deemed

necessary or proper for raising, forcing, retaining, or distributing or disposing of the water; that in 1874, in pursuance of its authority, the defendant took a parcel of land in West Roxbury containing about seven and one fourth acres, and constructed thereon a water gallery, and erected water works, by means of which water was taken from the Charles River, and supplied to the town and its inhabitants; that in 1875 the defendant took a further parcel of land adjoining the land previously taken, containing about twenty-three and one third acres; that the land thus taken and held by the defendant was all the land necessary or proper for the erection and maintenance of pumping stations, pipes, aqueducts, and other works necessary and proper for conveying the water from the Charles River to the defendant, and for all other purposes mentioned in the act of 1872; that on February 7, November 7, and December 30, 1889, and on April 26, 1890, the defendant took sundry other parcels of land in Dedham and Needham, containing in all about two hundred and ninety-five acres, among them being the land belonging to the plaintiff; and that, in pursuance of its alleged right in the land of the plaintiff thus taken, the defendant on October 29, 1890, and at sundry other times, entered upon the land of the plaintiff, and erected boundary stones and otherwise trespassed upon and injured the property of the plaintiff.

By paragraphs numbered 4, 5, and 6 of the plaintiff's bill he alleged that, prior to any of the last four takings or alleged takings of land by the town, viz. on February 7, November 7, and December 30, 1889, and April 26, 1890, the defendant had taken and purchased all the land that it was authorized to take under St. 1872, c. 343, and St. 1888, c. 131; that none of the land comprised within the last four takings was necessary or proper for laying or maintaining aqueducts or pipes, constructing or maintaining reservoirs, or any other works necessary or proper for raising, forcing, retaining, distributing, disposing, or discharging the water which the defendant was authorized to take from the Charles River; that especially was the land belonging to the plaintiff not within the authority given to the defendant to take land for the purpose of its water supply; that a large

part of the land belonging to the plaintiff was high land of a sandy surface, with a subsoil of ledge and rock, and distant from the river more than eighteen hundred feet; and that river water could not be obtained from it by percolation or otherwise, and that it was neither necessary nor fit for any use for which the defendant was authorized to take land; that all the acts of the defendant in taking or claiming to take the land of the plaintiff were beyond the powers of the town, and without legal authority, and in violation of the rights of the plaintiff; and that the acts of the defendant, and the filing of the taking in the registry of deeds constitute a cloud upon the title of the plaintiff, and that he has no adequate and complete remedy at law.

The prayer of the bill was that the taking or alleged taking of the land of the plaintiff be declared void, and that the defendant be ordered to execute to the plaintiff such a release as would remove the cloud upon his title, and that the defendant should be enjoined from taking or claiming to take the land of the plaintiff, and for the assessment of damages.

The answer admitted the taking of the several tracts of land, as alleged in the bill, and denied paragraphs 4, 5, and 6 thereof. It averred that, after the taking of the land of the plaintiff, the defendant by its servants and agents entered thereon for the purpose of surveying it, and set up certain boundary stones thereon, as alleged in the bill. It further averred, that by St. 1872, c. 343, and St. 1888, c. 131, both of which acts were duly accepted by it, it was duly authorized to take the various tracts of land as alleged by the plaintiff, and to do all the acts alleged in the premises; that all the land taken by it is either situated in the Charles River or on its banks, or is surrounded by the river, and is well adapted for the uses of the defendant for its water supply; that all of the land so taken is necessary for the use of the defendant for its water supply, and for the purpose for which it was taken under the statutes; and that all the lands so taken by the defendant are within the water-shed of the Charles River.

The defendant also demurred to the bill, and assigned as grounds thereof want of equity, that the plaintiff had a plain, adequate, and complete remedy at law, and laches.

Hearing before *Morton, J.*, who, at the request of the parties, reserved the case for the determination of the full court upon the bill and demurrer. If the demurrer should be sustained, the bill was to be dismissed; otherwise, to stand for hearing.

G. F. Williams & G. W. Anderson, for the plaintiff.

C. A. Williams, (*M. Williams* with him,) for the defendants.

MORTON, J. The principal questions involved in these two cases are the same, and by agreement of parties they were argued and are to be considered together.

The plaintiff contends, in both cases, that the taking was unlawful, and at the trial of the case in trespass he offered to show that, prior to the taking in question, the town had taken all the land that it needed, and that this was not suitable and was not necessary, useful, or proper for any of the purposes named in the acts under which it was taken. The plaintiff concedes, what is well settled, that the question whether a necessity exists for the taking of private property for a public use is a legislative, and not a judicial one. He does not deny that the taking of land for water works and a water supply for the general benefit of the inhabitants of a city or town is a taking for a public use; but he contends that where, as here, the authority is given "to take . . . any lands or real estate necessary," etc., the question of the necessity, so far as it relates to the land actually taken, is one of fact, to be settled by the court or jury. Such has not been deemed to be the law in this State, though it is said in a work of established authority that the constitutions of some of the States require it to be done. *Talbot v. Hudson*, 16 Gray, 417. *Dorgan v. Boston*, 12 Allen, 223. *Eastern Railroad v. Boston & Maine Railroad*, 111 Mass. 125. *Lund v. New Bedford*, 121 Mass. 286. *Cooley*, Const. Lim. (5th ed.) 538, note. There is no constitutional right on the part of the landowner in this State to have the question of the necessity or expediency of the taking in any particular instance submitted to a court or jury. *Holt v. Somerville*, 127 Mass. 408, 411. In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the State has delegated the authority to take. They have the same power as the State, acting through any regu-

larly constituted authority, would have. *Fall River Iron Works v. Old Colony & Fall River Railroad*, 5 Allen, 221, 226. *People v. Smith*, 21 N. Y. 595, 597. *Boom Co. v. Patterson*, 98 U. S. 403, 406. *Stockton & Darlington Railway v. Brown*, 9 H. L. Cas. 246. *Lewis v. Weston-Super-Mare Local Board*, 40 Ch. D. 55. Cooley, Const. Lim. (5th ed.) 538. See Lewis, Eminent Domain, § 238, note, for collection of cases. Of course neither the State nor its delegates can take under the guise of eminent domain the property of A. for the purpose of conveying it to B., or for a purpose clearly in excess of or at variance with the powers granted. No question of good faith, however, arises here, and the purpose for which the land was taken is within the scope of the acts authorizing it. The testimony that was offered was therefore rightly excluded, as was also that offered for the purpose of showing that the town was obtaining water from land taken in February, 1889, and that a part at least of the water thus taken did not come from the river by percolation. The validity of the taking now in question does not depend on the conduct of the town in regard to another and an earlier taking.

The plaintiff further contends that the formal requirements in relation to the taking were not complied with, and that the action of the selectmen and water board should have been ratified by the town. If it were necessary so to do, we well might rest our decision on the ground that the action of the town in defending these suits and in seeking to avail itself of what the selectmen and water board had done, coupled with its entry upon and taking possession of the land, constituted a ratification of their acts. *Fisher v. Attleborough School District*, 4 Cush. 494. *Kincaid v. Brunswick School District*, 11 Maine, 188. But we think all the formal requirements were complied with. The article in the warrant was "to appropriate money for land for the extension of our water supply, and to authorize the treasurer to borrow the same." By it the question of the extension of the water supply was brought before the voters anew, and the consideration of the article necessarily involved the question whether there should be any extension, and whether any additional land should be taken. Thereupon the town voted that "such land shall be purchased

or taken for extension of the water supply of the town as the selectmen and water board for the time being shall decide to be for the best interests of the town." It was not necessary that the town should designate the specific land to be taken, or that it should formally ratify what was done by the selectmen and water board. The St. 1872, c. 343, § 4, which was incorporated by reference into St. 1888, c. 181, expressly provided that the town might exercise the "rights, powers, and authorities" given to it by the act "in such manner and by such commissions, officers, agents, and servants as said town shall from time to time choose, ordain, appoint, and direct." Under this provision the town properly could delegate the power of taking to the selectmen and water board. *Eastern Railroad v. Boston & Maine Railroad*, 111 Mass. 125. *Lund v. New Bedford*, 121 Mass. 286. *Lyon v. Jerome*, 26 Wend. 485. *St. Peter v. Denison*, 58 N. Y. 416. The taking when completed by them became the act of the town. If there were any doubt before as to the power of the town to take from time to time, until the number of gallons specified and the amount of indebtedness authorized had been reached, the action of the Legislature in passing the act of 1888 without imposing any additional restrictions, and increasing the quantity of water that might be taken and the amount of indebtedness that might be incurred, would appear to have sanctioned the construction adopted by the town in regard to successive takings.

The plaintiff contends that by the demurrer the defendant admits that it had taken all the land that it was authorized to take before any of the last four takings, that none of the land included in the last four takings was necessary or proper for any of the purposes named in the acts, and that the plaintiff's land was not necessary or fit for any use for which the defendant was authorized to take and purchase land. The effect of the demurrer is to raise, more forcibly perhaps, the same question that was presented by the offer of proof in the case in trespass, namely, whether this court or any court can revise the action of the town authorities in taking the plaintiff's land. For reasons already given, we are of opinion that it cannot. The averment that the town had

taken before the last four takings all the land that it was authorized to take is a conclusion of law, and not an allegation of fact, and has already been considered.

The result is, that in the first case the entry must be Judgment on the verdict, and in the second, Bill dismissed, with costs, and it is

So ordered.

ROSA FELT, administratrix, vs. BOSTON AND MAINE
RAILROAD.

Middlesex. January 11, 1894. — May 17, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Negligence.

In an action for personal injuries the evidence entirely failed to disclose how the accident happened, or what caused it; the plaintiff's intestate, when asked how it happened, said that he did not know, and the cause and manner of the accident were wholly matters of conjecture. There was nothing to show any defect in ways, works, or machinery of the defendant to which it might be inferred the accident was due, nor any negligence on the part of the conductor or of any one else in charge of the train or engine. *Held*, that the action could not be maintained.

TORT, by the administratrix of George A. Felt, for causing his death.

Trial in the Superior Court, before *Hopkins*, J., who ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions, in substance as follows.

The intestate, on September 23, 1891, while engaged in the performance of his duties as head brakeman on a freight train on the defendant's railroad, was run over, and received injuries which shortly after resulted in his death. One Quinlan, the conductor of the train, which consisted of an engine, a box car about thirty feet long, a loaded coal car, and a "buggy," testified that he directed the intestate to switch off the coal car on to a side track, and he did not see him again until he found him lying injured between the rails under the rear of the box car; that

the intestate crawled out from between the rails to the side of the track; that it appeared that a rear wheel of the box car had run over him; that the train was running about four miles an hour; that the witness examined the switch, and found it all right; that he saw that the pin which held the link connecting the box car and the coal car had not been drawn; that they were in good condition; that there were other switches on the line as near to the track as this switch, and that Felt had worked as head brakeman under him on that road one year, and that it was his duty to do the work he had directed him to do; that the deceased might have waited until the train stopped before attempting to pull the pin, but that brakemen generally pulled the pin while the cars were in motion.

John J. Fletcher, the head end brakeman, testified that he stood on top and in the middle of the box car, waiting to receive from Felt and give to the engineer the signal; that he saw Felt throw the switch, and, standing close to the car to pull the pin, give him, the witness, the signal to kick the car; that he gave the signal to the engineer, and the engineer backed the train; that he did not watch Felt after he gave the signal, but after the train had moved backward a few feet he felt the rear of the box car rise up as if it had run over something; that somebody hollered, and the train stopped; that he got off the car, and when he got to the rear of it saw Felt lying outside the rails; and that he asked Felt how it happened, and he said he did not know.

F. M. Davis, for the plaintiff.

G. F. Richardson & G. R. Richardson, (*D. M. Richardson* with them,) for the defendant.

MORTON, J. The evidence entirely fails to disclose how the accident happened, or what caused it. The plaintiff's intestate said, when asked how it happened, that he did not know. The cause and manner of the accident are wholly matters of conjecture. There is nothing in the evidence tending to show any defect in the ways, works, or machinery of the defendant to which it might be inferred that the accident was due, nor any negligence on the part of the conductor or any one else in charge of or managing the train or engine.

Exceptions overruled.

JEREMIAH SHAW vs. NATHAN APPLETON & another.

Suffolk. January 22, 1894. — May 17, 1894.

Present: ALLEN, HOLMES, MORTON, & BARKER, JJ.

Lease — Reservation of Right to sell Demised Premises.

A clause in a lease reserving to the lessor the right to sell, and providing that any of the demised land sold during the term should cease to be a part of the demised premises, is valid.

BILL IN EQUITY, filed January 20, 1893, alleging that on March 18, 1892, the defendant Appleton executed to the plaintiff a lease, for the term of two years from March 15, 1892, of a parcel of land in Brighton, containing about twelve acres, of which premises Appleton was the owner in fee; that on May 15, 1892, the other defendant, the Brookline Artificial Ice Company, entered upon the plaintiff's close and built upon it, and especially around that part of the same known as the Undine Springs, erected certain structures and fences, and attempted to evict the plaintiff therefrom, and denied to him the right to enter upon the close, or to have access to the springs or to take water therefrom; that the plaintiff was informed and believed that the defendant company intended to continue the acts of trespass alleged; that the land described in the lease contained a spring of natural water of valuable medicinal qualities and of especial purity, and that the right to take water therefrom was of value; that prior to the alleged acts of trespass the plaintiff was engaged in distributing to customers in Boston the water taken from the springs, and was in the receipt of large profits from the sale thereof, and that by the alleged acts of trespass of the defendants he was wholly deprived of those profits.

The prayer of the bill was that the Brookline Artificial Ice Company should be restrained from further entering upon or trespassing upon the plaintiff's close, or from further interfering with the plaintiff's access to the springs, or any other part of the close described in the lease.

The lease referred to in the bill contained a provision that "said Appleton reserves to himself the right at any time to sell and convey any or all of the land herein demised, and upon any such sale or conveyance so much of said land as shall be so sold or conveyed shall cease to be a part of the herein demised premises."

The defendant Appleton demurred to the bill for want of equity, and the plaintiff subsequently discontinued as to him.

The defendant company demurred to the bill on four grounds, and assigned as the fourth ground thereof, that, for aught that appeared from the bill, or from the copy of the lease thereto annexed, the trespasses alleged to have been committed by the defendant were such acts as it would have the right to do by virtue of a sale and deed from Appleton executed under the authority and power reserved by him in the lease; that it did not appear from the bill that the plaintiff had any rights in the premises other than under the lease, nor did it appear that the alleged trespasses were committed by the defendant under the authority of Appleton in violation of the provisions of the lease, or by virtue of any paramount authority, or under any claim of right, or that they were not the acts of a stranger.

At the hearing, the demurrer was sustained on the fourth ground, and the bill dismissed with costs; and the plaintiff appealed to the full court.

W. R. Bigelow, for the plaintiff.

F. L. Hayes, for the defendants.

BARKER, J. In support of his contention that the clause is void whereby the lessor "reserves to himself the right at any time to sell and convey any or all of the land herein demised, and upon any such sale or conveyance so much of said land as shall be so sold or conveyed shall cease to be a part of the herein demised premises," the plaintiff urges that a reservation is void which is repugnant to the words by which the estate demised is defined and limited. But, as held in *Cutler v. Tufts*, 3 Pick. 272, 276, the rule invoked is a technical one, which may force a construction different from the intent of the parties, and therefore not to be acted upon but in the last resort, and there is no occasion to resort to it in the

present case. It is clear from the whole lease that the contract was not that the lessee was at all events to hold for two years the land demised, but that his right in so much as should be sold during the term should cease upon such sale. Such bargains are common, and clauses inserted to express them have often been given effect. See *Munigle v. Boston*, 3 Allen, 230, 232; *O'Connor v. Daily*, 109 Mass. 235. In *Pynchon v. Stearns*, 11 Met. 304, relied upon by the plaintiff as governing the case at bar, the reservation which the demandant contended was repugnant to the habendum of his lease, was not held void, but was so construed as to amount to a valid covenant, permitting the lessor to enter and erect houses on the demised land. Any provision stipulating that during the term a lessor may enter or may terminate the lease is, in a sense, repugnant to words demising land for a fixed term; but such stipulations are found in most leases, and are not held void because repugnant to the words of demise. See *Hunnewell v. Bangs*, ante, 132. When, as in the present case, it is clear that the contract was that the lessee should take his estate subject to a defeasance by a sale of the demised property by the lessor, to hold the clause defining the reserved right of the lessor void because repugnant to the demise would be unwarrantably to defeat an intention which the parties have clearly expressed. It follows that the plaintiff's bill was bad, for the fourth reason assigned in the demurrer, and that it must be dismissed.

Bill dismissed, with costs.

AARON PRATT vs. CHARLES S. BATES.

Norfolk. January 23, 1894. — May 17, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Sale of Land subject to Contingent Remainders — Petition signed by Attorney — Insufficient Description of Premises — Appointment of Guardian ad Litem after Entry of Decree — Waiver — Case stated.

The submission of a case to the Superior Court, and to this court on appeal, on agreed facts, which includes the proceedings in the Probate Court by which a trustee was appointed under Pub. Sts. c. 120, §§ 19, 20, and authorized to sell

land subject to a contingent remainder, is a waiver of the objection that the proceedings in the Probate Court cannot be impeached collaterally.

On a bill in equity to compel the specific performance of an agreement to purchase land, it appeared that the plaintiff, on the petition under Pub. Sts. c. 120, §§ 19, 20, of a person in possession of land subject to a contingent remainder, was appointed by the Probate Court a trustee to sell the land. The petition was signed by the petitioner's attorney, and recited that he had an "estate in possession in about three quarters of an acre of land, be the same more or less, situated south of N. Street in the town of C., . . . subject to various contingent remainders under the will of M., late of said C., deceased." It further appeared that the appointment of the guardian *ad litem* and next friend to represent the possible issue of the petitioner was not made until after the decree appointing the trustee and authorizing the sale. *Held*, that the petition was properly signed by the petitioner's attorney; that the description of the premises in the petition was insufficient; that the appointment of the guardian *ad litem* should have been made before the entry of the decree appointing the trustee and authorizing the sale, and that Pub. Sts. c. 142, § 18, did not apply, for the reason that the premises were not "held by one who purchased them in good faith" under the probate proceedings.

BILL IN EQUITY, filed January 30, 1893, to compel specific performance of an agreement to purchase land.

Hearing in the Superior Court, on the bill, answer, and agreed facts, in substance as follows.

On May 12, 1892, one George E. Fisher, of Kenyon, in the State of Rhode Island, who was a devisee under the will of Sarah B. Mayo, deceased, filed a petition under Pub. Sts. c. 120, §§ 19, 20, in the Probate Court for the County of Norfolk, reciting that he had "an estate in possession in about three quarters of an acre of land, be the same more or less, situated south of North Main Street in the town of Cohasset," in the county of Norfolk, and "that said real estate is subject to various contingent remainders under the will of Sarah B. Mayo, late of said Cohasset, deceased," and asking for the appointment of a trustee, and the sale of the real estate. The petition was signed, "George E. Fisher, by his attorneys, Simmons and Pratt." The description in the citation was like that in the petition, except that it did not state that the petitioner had an estate in possession. On the second Wednesday in June, 1892, the Probate Court entered a decree appointing the plaintiff trustee, and authorizing him to sell and convey the real estate in fee simple by private sale or public auction. Subsequent to the entry of the decree appointing the plaintiff trustee and authorizing the sale, one Newhall was appointed by the Probate Court guardian *ad litem* and next

friend to represent the possible issue not in being of George E. Fisher. At the argument in this court, it was agreed, if competent, that the guardian did not take the oath required of him until after the sale of the land by the trustee. The plaintiff, as such trustee, gave bond, and after due notice, pursuant to the order of the court, sold the land at public auction on July 12, 1892, to the defendant, who, through his duly authorized agent, signed an agreement of purchase stipulating that payment should be made "on delivery of the deed of said land at any time within six days, with a good title." The plaintiff seasonably tendered the defendant a deed, in which the land was bounded and described as follows: "northerly by said North Main Street about sixteen (16) rods and nine (9) links; easterly by said highway about twenty (20) links; southerly by land of Mary and Priscilla Lincoln seventeen (17) rods and seven (7) links, and westerly by land of Thomas Reedy, formerly land of Sarah P. Tolman, being the same premises described in a deed thereof from Levi Willcutt to Sarah B. Mayo, dated October 2, 1854, and recorded with Norfolk County Deeds, Book 281, page 211, reference thereto being had." The defendant refused to accept the deed, or to pay the purchase price.

The Superior Court ordered the bill to be dismissed; and the plaintiff appealed to this court.

J. F. Simmons, for the plaintiff.

F. V. Balch, for the defendant.

MORTON, J. This case was heard in the Superior Court on agreed facts, and comes here by appeal from the decree dismissing the bill. The facts as agreed include the proceedings in the Probate Court by which a trustee was appointed and was authorized to make the sale. They also state that the appointment of Newhall as guardian *ad litem* and next friend, and to represent the possible issue of George E. Fisher, was not made till after the decree appointing the trustee and authorizing the sale. It was agreed at the argument in this court, if competent, that the guardian did not take the oath required of him till after the sale. We think that the effect of the agreed facts is to waive the objection that the regularity of the proceedings in the Probate Court cannot be impeached collaterally, and to submit independently of that consideration the question whether the defendant

should or should not be compelled to complete the purchase and to take the deed which has been tendered to him. *Wheelock v. Henshaw*, 19 Pick. 341. *Commonwealth v. Greene*, 13 Allen, 251.

The first objection urged by the defendant is that the petition for the appointment of a trustee and the sale of the land was not signed by the petitioner, but by his attorney. We think that this objection is fully met by the case of *O'Neil v. Glover*, 5 Gray, 144. Without repeating and applying the reasoning of that case to this, it is enough to say that considerations similar to those which led the court to hold in that case that a signing of the petition by attorney was sufficient lead to a like result in this.

The defendant objects, in the next place, that by reason of the imperfect description of the estate in the petition and citation there was no sufficient legal notice to the parties interested. The petition sets out that the petitioner lives in Rhode Island, and "has an estate in possession in about three quarters of an acre of land, be the same more or less, situated south of North Main Street in the town of Cohasset," in the County of Norfolk, and that said real estate is "subject to various contingent remainders under the will of Sarah B. Mayo, late of said Cohasset, deceased." The citation is like the petition, except that it does not state that the petitioner has an estate in possession. In a writ of entry or a petition for partition it is clear that the description would not be sufficient; *Rochester Proprietors v. Hammond*, Quincy, 159; *Miller v. Miller*, 16 Pick. 215; *Atwood v. Atwood*, 22 Pick. 283; though no doubt it would be in a deed. The original proceeding in the Probate Court was not a suit between certain parties. It was in the nature of a proceeding *in rem*; and we think that the *res* which in such cases is the subject of the application to the Probate Court should be so fully described, where practicable, that any of the persons interested may readily understand and discern from the citation and petition what real estate is referred to. In the present case it is possible that a person interested might infer from the statement that the real estate was subject to various contingent remainders under the will of Sarah B. Mayo, and that she was formerly the owner of it; and if he also knew that she owned but one lot of land in Cohasset, he might conclude that the parcel described in

the deed was the one intended. But there is no allegation in the petition or citation that she was formerly the owner, or that it was the only tract of land in Cohasset belonging to her at her decease. The land is described in the petition and citation as "south of North Main Street." Whether this means that it is bounded on the north by that street, or is situated some distance to the south of it, is uncertain. While it is said that the petitioner "has an estate in possession," there is nothing to show that any one was in actual occupation, and the description of the area as "about three quarters of an acre, . . . more or less," manifestly would be of little assistance in understanding what land was meant. In view of the fact, as appears from the deed, that it was possible to describe the land much more fully, and taking also the character of the proceeding into account, we incline to hold that the description is too indefinite.

Lastly, the defendant objects that the decree is invalid because of the failure to appoint before its entry some one as guardian *ad litem* and next friend to represent contingent interests. We think this objection is well taken. The language of the statute is, "The court shall in every case appoint a suitable person to appear and act therein as the next friend of all minors, persons not ascertained, and persons not in being, who are or may become interested in such real estate." Pub. Sts. c. 120, § 20. We regard this language as mandatory, and not as directory merely. The object of the provision is to protect the interests of the persons described; and in order to accomplish that purpose, the appointment and qualification of the person appointed, and his examination into the subject matter of the petition, should precede, and not follow, the entry of a decree regarding the sale prayed for. In the nature of things the persons represented are not, and cannot be, before the court; and justice requires that, before a decree can be passed that shall conclude their rights, their representative should be in a position to be heard respecting it. We do not mean to intimate that, if a decree had been inadvertently entered before the appointment of a guardian *ad litem*, it could not be vacated, and a guardian *ad litem* appointed and a new decree entered under which a sale could take place. The provisions of Pub. Sts. c. 142, § 18, do not apply, for the reason that the premises are

not "held by one who purchased them in good faith" under the probate proceedings. That statute was designed for the protection of purchasers, not of executors and trustees.

Upon the whole case, we think the decree of the Superior Court should be affirmed, and it is *So ordered.*

JAMES HEWINS & others, assignees, vs. CHARLOTTE E. BAKER.

Suffolk. January 24, 1894. — May 17, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Collateral Security — Assignment of Policies of Insurance — Assent of Company — Waiver.

The delivery of an insurance policy for a valuable consideration, with the intent to vest the title in the assignee, operates as a valid transfer, and the equitable interest thus acquired by the assignee will be protected and enforced in courts of law.

A failure to obtain the consent of an insurance company to an assignment of a policy, as required by its terms, may defeat the policy, but does not render invalid the transfer; and it seems that an issuance of a paid up policy by the company in place of the original policy after an assignment of the latter without its consent, is a waiver of that requirement.

On the question whether M., the maker of certain promissory notes, delivered to B., the holder of them, certain policies of insurance as collateral security for his notes, B. testified that "he [M.] said he would assign them to me; . . . he put them all in my box; . . . he said they were collateral security for all those notes; he said he assigned these policies to me for security for those notes; he told me they were all mine; he said they were mine just as much as if I had the money; . . . he told me that the writing was to show that those policies belonged to me, and when his estate was settled, or if I should die suddenly, it would be all right, because I saw him put them in the box; . . . he said those policies of insurance were mine; that he had assigned them to me and that he gave them to me." B. further testified that he saw M. put the policies in his box, which, though kept in M.'s safe, had a tag on it bearing the words "Property of B., Boston, Mass."; and that subsequently the box with its contents and the key which had been kept by M. were left with B. for examination, and thenceforth remained in his possession. *Held*, that upon this evidence a finding was warranted that the policies were delivered to B. by M. as collateral security for his notes.

BILL IN EQUITY, filed August 10, 1893, by the assignees in insolvency of the estate of Moody Merrill, to obtain possession

of certain policies of insurance, and for the surrender and cancellation of a certain written instrument purporting to transfer to the defendant the policies of insurance, with a view, as alleged, to give a preference in fraud of the insolvent law.

Hearing in the Superior Court, before *Hammond*, J., who reserved the case for the determination of this court, on facts in substance as follows.

The defendant had for many years intrusted the insolvent, *Moody Merrill*, with the care of a large amount of her property, and had given to him large sums of money for investment for her in stocks and other securities, which were placed in a box kept in *Merrill's* safe at his office, but bearing a tag containing, in the defendant's handwriting, the words, "Property of *Charlotte E. Baker*, Boston, Mass." *Merrill* collected her interest, and settled with her semiannually, and, a large balance remaining unpaid, he gave her his notes, to which, in July, 1892, she asked for some collateral security. Thereupon, as the defendant testified, he said that he would give to her as security for the notes certain policies of insurance; "he [*Merrill*] said he would assign them to me; . . . he put them all in my box; . . . he said they were collateral security for all those notes; he said he assigned these policies to me for security for those notes; he told me they were all mine; he said they were mine just as much as if I had the money; . . . he told me that the writing was to show that these policies belonged to me, and when his estate was settled, or if I should die suddenly, it would be all right, because I saw him put them in the box; . . . he said those policies of insurance were mine; that he had assigned them to me, and that he gave them to me."

The defendant further testified, that in December, 1892, not doubting that everything was all right in *Merrill's* dealings, she asked him for her box, and in January, 1893, he left it with her for examination; that the policies were in it, wrapped around with a paper, on the back of which was written, in the handwriting of *Merrill*, "Assignment of policies"; and on the inside in his handwriting, "Life insurance policies on the life of *Moody Merrill*, July 25, 1892." Inside the wrapper was the following written direction: "Boston, July 25, 1892. In consideration of one dollar to me paid by *Charlotte E. Baker*, of

Boston, widow, I hereby direct James Hewins and Winthrop Minot Merrill, or whoever may settle my estate, in case of my decease, to appropriate the proceeds of Policy No. 121,715, No. 121,716, and No. 121,991 in the Connecticut Mutual Life Insurance Company, and No. 20,550, No. 21,898, and No. 22,947 in Home Life Insurance Company, and No. 166,241 in the Mutual Life Insurance Company of New York, to the payment of any notes or demands said Charlotte may hold against me at the time of my decease, and to pay any balance remaining due after such appropriation from other property belonging to my estate, without waiting to administer upon the same, upon said Charlotte releasing all claim to any stock, bonds, notes, or mortgages held by her or laid aside as collateral security for said notes and demands against me. Witness my hand and seal this twentieth day of July, A. D. 1892. Moody Merrill. [Seal.] ”

This writing was enclosed in an envelope addressed in Merrill's handwriting, “To James Hewins, Winthrop M. Merrill, or whoever may administer my estate, Boston, July 25, 1892.” This address the defendant testified she read when the writing, envelope, and policies were put in her box, July 25, 1892. After the box had been left with the defendant she kept it in her possession, with its contents, including the policies of insurance, which, before the filing of the bill, the plaintiffs demanded of her.

Of these policies three were issued by the Connecticut Mutual Life Insurance Company, and were for \$5,000 each ; two of them were fully paid up, while on the third the last premium was not payable until February 28, 1902. They were all payable to the legal representatives of Moody Merrill. Each of them contained this provision : “This policy is issued and accepted upon the following express conditions and agreements. . . . No assignment of this policy shall be valid unless made in writing indorsed hereon ; and that any claims against this company arising under this policy made by any assignee shall be subject to proof of interest.”

Three other policies, for \$2,000, \$3,000, and \$5,000, respectively, fully paid up, and payable to Moody Merrill, his executors, administrators, and assigns, were issued by the Home Life Insurance Company. Each of them provided that “it is further understood and agreed by and between the parties hereto . . .

that this policy shall not be assigned without the consent of the company in writing previously obtained."

The remaining policy, issued by the Mutual Life Insurance Company of New York, was for \$10,000, payable to Merrill, "his executors, administrators, or assigns," and contained a condition that "the provisions and requirements printed by the company upon the back of this policy are hereby referred to and accepted as part of this contract, as fully as if they were recited at length over the signatures hereto affixed." On the back of the policy was the following provision: "Assignments. This company will not take notice of any assignment of this policy until a duplicate or a certified copy thereof shall be delivered to the company at its principal office; and under no circumstances will the company assume any responsibility for the validity of such assignment; if any claim be made under an assignment, proof of interest to the extent of the claim will be required." Merrill defaulted on the annual premium payable on April 25, 1893, and in September, 1893, the defendant returned that policy to the company, and on application received in its place a paid up policy for \$4,826. This policy contained the provision, "In consideration of the application for a former policy, No. 166,241, and of the surrender of the former policy," the company promised "to pay to Moody Merrill, his executors, administrators, or assigns, \$4,826, without profits, upon acceptance of satisfactory proofs at its home office of the death of said Moody Merrill during the continuance of this policy, subject to the provisions stated on the back of this policy, which are hereby referred to and made part hereof, and subject to all claims and equities attaching to the ownership of said former policy." On the back of said policy was the following provision: "The company declines to notice any assignment of this policy until the original assignment, or a duplicate or certified copy thereof, shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment."

The judge found that these policies, and the paper dated July 25, 1892, set forth in the plaintiffs' bill, were on that day delivered as collateral security to the defendant for the notes of Merrill, and at the time of their delivery the defendant believed, and from what was said to her by Merrill was justified in be-

lieving that the policies were assigned to her as collateral security for whatever was then due or might thereafter become due from him to her; that she read the paper dated July 25, 1892, and understood the language, and that if it has any effect inconsistent with the assignment she did not understand that effect.

D. E. Ware, for the plaintiffs.

F. S. Hesseltime, (*N. F. Hesseltime* with him,) for the defendant.

MORTON, J. It is not necessary to decide whether the writing signed by Merrill did or did not constitute a valid assignment of the policies to the defendant. Independently of that, there was evidence that Merrill transferred them to her, and that she received them as collateral security for the notes which she held against him. The defendant testified, among other things, that "he [Merrill] said he would assign them to me; . . . he put them all in my box; . . . he said they were collateral security for all those notes; he said he assigned these policies to me for security for those notes; he told me they were all mine; he said they were mine just as much as if I had the money; . . . he told me that the writing was to show that those policies belonged to me, and when his estate was settled, or if I should die suddenly, it would be all right, because I saw him put them in the box; . . . he said those policies of insurance were mine; that he had assigned them to me, and that he gave them to me." There was also evidence that the box, though kept in Merrill's safe, had a tag on it, with the words, "Property of Charlotte E. Baker, Boston, Mass.," and that some months after this transaction the box with its contents, and the key, which Merrill had had, were left by him with the defendant for examination, and thenceforward remained in her possession. Upon this evidence, the court was justified in finding that the policies were delivered to the defendant by Merrill as collateral security for his notes.

It is well settled that the delivery of such a chose in action as an insurance policy for a valuable consideration, with the intent to vest the title in the assignee, operates as a valid transfer, and that the equitable interest thus acquired by the assignee will be protected and enforced in courts of law. *Crain v. Paine*, 4 Cush. 483. *Palmer v. Merrill*, 6 Cush. 286. *Currier v.*

Howard, 14 Gray, 511. *Norton v. Piscataqua Ins. Co.* 111 Mass. 532. There is nothing in the writing inconsistent with the parol assignment. It does not purport on its face to be so much an assignment of the policies to the defendant, as a direction regarding the disposition of the proceeds to those who should administer on his estate, and who would hold the legal title to the policies; and it recognizes, by implication at least, that the defendant is entitled to and has an interest in the proceeds of the policies. The indorsement on the wrapper of the words "Assignment of policies" is not conclusive as to the effect of the writing.

In three of the policies there was a provision that the assignment should be in writing, and in three others a provision that the policies should not be assigned without the written consent of the company. In the policy of the Mutual Life Insurance Company of New York, it was provided that the company would not take notice of any assignment until a duplicate or certified copy thereof should be delivered to the company at its principal office. The plaintiffs contend that there were no assignments of the policies, because these various provisions were not complied with. But it is expressly said in *Merrill v. New England Ins. Co.* 103 Mass. 245, 252, of a provision that the policy should be null and void if assigned without the written consent of the company, that it "does not prevent the transfer or pledge of the policy. It reserves to the company the right to give or to refuse its consent to such transfer; and, if made without its consent, to avoid its contract altogether. The effect of the condition is, to defeat the policy; not to defeat the transfer." The same reasoning applies to provisions requiring that assignments should be in writing, or requiring duplicate or certified copies to be delivered to the company at any particular place. Besides, in the case of the Mutual Life Insurance Company of New York, the company, by issuing a paid up policy, would seem to have waived the provision relied on, and it is difficult to see how the plaintiff can set it up.

The result is, that the bill must be dismissed, with costs, and it is

So ordered.

NEW YORK BISCUIT COMPANY vs. CITY OF CAMBRIDGE.

Middlesex. March 2, 1894. — May 17, 1894.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Tax — Debts due — Goods, Wares, and Merchandise.

Debts due do not come within the description of goods, wares, merchandise, and other stock in trade, taxable under Pub. Sts. c. 11, § 20, cl. 1.

MORTON, J. The question in this case is whether the debts due to the plaintiff in connection with its business at Cambridge from various persons, firms, and corporations are taxable there as goods, wares, merchandise, and other stock in trade, under Pub. Sts. c. 11, § 20, cl. 1. Debts due to a person are certainly not goods, wares, or merchandise. The latter words occur in the statute of frauds, (Pub. Sts. c. 78, § 5,) and though it is held in this State that shares in corporations are goods, wares, and merchandise within the meaning of that statute, it is said that "the words of the statute have never yet been extended . . . beyond securities which are subjects of common sale and barter, and which have a visible and palpable form." *Somerby v. Buntin*, 118 Mass. 279, 285. There is no reason why a wider meaning should be given to them when applied to taxable property. It is said in *Boston Investment Co. v. Boston*, 158 Mass. 461, 463, that "it is not contended, and it could not successfully be contended, that money in bank is 'goods, wares, merchandise,' or 'stock in trade,' within the meaning of the first clause of § 20 of c. 11 of the Public Statutes." If money in bank does not constitute stock in trade, clearly debts due one do not. The language of the statute is "all goods, wares, merchandise, and other stock in trade," etc., and we think it apparent from the connection and the rest of the clauses that by stock in trade is meant the visible and tangible property with which the trade or business of the owner is carried on, and to which it relates. See *Hittinger v. Westford*, 135 Mass. 258, 260.

According to the agreed facts, judgment should be entered for the plaintiff for fourteen hundred and twenty-six dollars and interest from October 10, 1891, and it is *So ordered.*

D. A. Dorr, for the plaintiff.

G. A. A. Pevey, for the defendant.

HERBERT RADCLYFFE vs. GEORGE S. BARTON.

Suffolk. March 2, 1894. — May 17, 1894.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Audita Querela — Deposition — Pleadings as Evidence — Rule of Court.

On June 11, 1878, an action was brought by A. on a promissory note for \$1,000, signed by B. and indorsed by C., and the *ad damnum* in the writ was laid at \$300. The action was entered in July, 1878, and on July 20 judgment was entered thereon by default for \$300. On July 12, 1879, on motion, the judgment was vacated, the action brought forward, the *ad damnum* was increased to \$1,500, and a new judgment entered in favor of A. for \$1,116.78 damages. Execution issued, and a small amount was paid thereon. On October 27, 1879, A. assigned to C., the indorser, the judgment and execution obtained in July, 1879, and on March 21, 1888, an action was brought on the judgment in the name of A. "for the benefit of" C., assignee. This action was defended by B., who set up various equitable defences as against C., but made no mention of the increase of the *ad damnum*. At the trial it was adjudged that the answer set forth no defence, and a verdict was ordered for the plaintiff, and on May 20, 1889, judgment was entered in his favor for \$1,796.13 damages, which was paid by B. On June 6, 1889, B. sued out of this court a writ of error, on which the judgment entered against him on July 12, 1879, was reversed, for the reason that the judgment entered in July, 1878, could not be vacated on a mere motion, and this left the judgment of July, 1878. in force. On September 24, 1891, B. sued out a writ of *audita querela* to set aside the judgment for \$1,796.13 obtained on May 20, 1889, and to recover damages. After the action was brought A. died, and his executor was allowed to appear and defend. At the trial the presiding justice found that at some time in June, 1878, and before the entry of the first action, C. paid to A. the amount then due upon the note, and that all the subsequent proceedings set forth in the declaration were begun and carried on by C. for his benefit in the name of A., and without consultation with him, and that the fact that such proceedings were so begun and carried on was known to B. during the pendency of the suit upon the judgment. *Held*, that as against A., who had nothing to do with the prosecution of the action on the judgment which was brought in his name for the benefit of C., and who had received nothing from the judgment, the writ of *audita querela* would not lie. *Held, also*, that the pleadings in the action upon the judgment which were offered for the purpose of proving that the issues in this case were involved in that one were admissible for the purpose for which they were offered. *Held, also*, that the answer in the action on the judgment, which was also offered independently to prove certain facts, and which was signed by B. personally, was competent, as containing deliberate admissions made by him.

If the facts testified to in a deposition of one of the parties to an action are material to the issues both in that action and in a later one between the same parties, the deposition is competent evidence in the later action where the deponent has died before the trial.

The forty-first rule of the Superior Court, which provides that "when a deposition has been filed, if not read on the trial by the party taking it, it may be used by the other party, if he sees fit, he paying the costs of taking the same," does not state a condition precedent; and while it is in the discretion of the presiding justice to exclude a deposition so offered in evidence, if the costs are not paid on the demand of the party taking it, yet if no demand is then made, and the deposition is admitted, it is no ground for thereafter holding it to be improperly admitted that the costs of taking it have not been paid or tendered.

A writ of *audita querela* will be of no avail where the party complaining has already had an opportunity for defence.

LATHROP, J. This is a writ of *audita querela*, dated September 24, 1891, to set aside a judgment obtained on May 20, 1889, in an action brought in the name of Barton against Radclyffe, and to recover as damages the sum of \$1,372.88, with interest from June 29, 1889. After the action was begun, Barton died, and his executor was allowed to appear and defend.

At the trial in the Superior Court, before a single justice, the following facts were proved or admitted. On June 11, 1878, an action was brought by Barton on a promissory note for \$1,000, dated in 1873, signed by Radclyffe and indorsed by George M. Rice. The *ad damnum* stated in the writ was \$300. The action was entered in July, 1878. Radclyffe was defaulted, and on July 20, 1878, judgment was entered upon the default for \$300. On July 12, 1879, on motion, the judgment was vacated, the suit was brought forward, the *ad damnum* was increased to \$1,500, and a new judgment entered in favor of Barton for \$1,116.73 damages. Execution issued, and a small amount was paid thereon.

On October 27, 1879, Barton assigned to Rice the judgment and execution for \$1,116.73. On March 21, 1888, an action was brought on this judgment, in the name of Barton, "for the benefit of George M. Rice," assignee. This action was defended by Radclyffe, who set up various equitable defences as against Rice, but no mention was made in the answer that the *ad damnum* had been increased. At the trial, it was ruled that the answer set forth no valid defence, and the court ordered a verdict for the plaintiff. On report, this court was of opinion that the ruling was right, and, on May 11, 1889, ordered judgment on the verdict. *Barton v. Radclyffe*, 149 Mass. 275. On May 20, 1889, judgment was entered in favor of the plaintiff in the sum of \$1,796.73 damages. On the same day Radclyffe paid

part of the judgment against him, and in the latter part of June (the 29th, as alleged in the declaration) paid the rest of it, after having been arrested on poor debtor proceedings. These payments were made to the officer having the execution.

On June 6, 1889, Radclyffe sued out of this court a writ of error to reverse the judgment entered on July 12, 1879, and the judgment was reversed, for the reason that the judgment entered in July, 1878, could not be vacated on a mere motion. *Radclyffe v. Barton*, 154 Mass. 157. This left the judgment of July, 1878, in force.

The judge found that at some time in June, 1878, and before the entry of the first action, Rice paid to Barton the amount then due upon the note, and that all the subsequent proceedings set forth in the declaration were begun and carried on by Rice in the name of Barton, for the sole benefit of Rice, and without consultation with Barton; and that the fact that such proceedings were so begun and carried on was known to Radclyffe during the pendency of the suit upon the judgment.

These findings depend largely upon the question of the admissibility in this action of the pleadings in the action upon the judgment, and of a deposition of Barton taken in that action by Radclyffe. The pleadings were offered for the purpose of proving that the issues in the present case were involved in the action on the judgment, which it is now sought to reverse. The answer in that action was also offered independently to prove certain facts. This answer was signed by Radclyffe personally.

We have no doubt that the pleadings were admissible for the purpose for which they were offered. And we are of opinion that the answer was also competent evidence as deliberate admissions made by Radclyffe. *Central Bridge Co. v. Lowell*, 15 Gray, 106, 122. *Bliss v. Nichols*, 12 Allen, 443, 445. See also *Elliott v. Hayden*, 104 Mass. 180.

If the facts testified to by Barton in his deposition in the action on the judgment are material to the issue in the present case, and were material to the issue in that case, we see no reason to doubt that, as he has since died, the deposition, being taken in an action between the same parties, was competent evidence. *Yale v. Comstock*, 112 Mass. 267. The question presented in *Sewall v. Robbins*, 139 Mass. 164, was not the

admissibility of the deposition of a deceased witness, but of a living witness; and the case has no application to the question before us.

The plaintiff further contends that the defendant had no right to use the deposition without first paying or tendering the expense of taking it. The forty-first rule of the Superior Court provides that, "when a deposition has been filed, if not read on the trial by the party taking it, it may be used by the other party, if he sees fit, he paying the costs of taking the same." While the report finds that the defendant did not pay or offer to pay the expense of taking the deposition, it also finds that the plaintiff did not demand such payment when the deposition was offered in evidence. We do not regard the rule as stating a condition precedent, but as giving the party taking the deposition the right to be repaid the costs thereof in case he does not use it and the other party wishes to use it. It is no doubt within the discretion of the presiding justice to exclude a deposition so offered in evidence, if the party taking it then demands payment of the costs, but if no demand is then made, and the deposition is admitted, it is no ground for holding it to be improperly admitted that the costs of taking it have not been paid or tendered.

It is not contended that the findings of the justice are not fully warranted by the evidence, if the answer and deposition are in evidence. The remaining questions are, whether, on the facts proved or admitted, the judge was bound, as matter of law, to order judgment for the plaintiff, and whether his finding for the defendant was wrong.

The writ of *audita querela* is a common law writ, which is recognized by statute in this Commonwealth as an existing remedy. Pub. Sts. c. 186, §§ 1-6. By § 3, the cause is to be heard by the court "upon any issue of law or fact," and such judgment is to be rendered "as law and justice shall require."

As was said of the earliest statute on this subject in this Commonwealth, (St. 1780, c. 47.) the present statute "has left the question of the cases, in which it is a suitable remedy, to be determined by rules and precedents at common law." *Lovejoy v. Webber*, 10 Mass. 101.

In the case last cited, the writ was held to be a suitable

remedy where a debtor, after service of an original writ upon him, and before its return, satisfied the demand, and the creditor afterwards entered the action, recovered judgment, and caused his execution to be levied on the debtor's property. See also *Thatcher v. Gammon*, 12 Mass. 267, 270.

So, where one of two judgment debtors pays the judgment, and the execution, instead of being returned satisfied, is returned unsatisfied, and an alias execution is taken out on which the other debtor is arrested. *Brackett v. Winslow*, 17 Mass. 153.

So, where the execution calls for a larger sum than is authorized by the judgment. *Stone v. Chamberlain*, 7 Gray, 206.

So, if the judgment debtor resides out of the Commonwealth, and the creditor, having obtained judgment by default, takes out execution within one year thereafter, without first giving bond, as required by law. *Dingman v. Myers*, 13 Gray, 1.

The writ, however, will be of no avail where the party complaining has already had an opportunity of defence. *Lovejoy v. Webber*, *ubi supra*. *Faxon v. Baxter*, 11 Cush. 35. *Goodrich v. Willard*, 11 Gray, 380. *Barker v. Walsh*, 14 Allen, 172. *Barrett v. Vaughan*, 6 Vt. 243. *Avery v. United States*, 12 Wall. 304. Com. Dig. Audita Querela, C.

In the case at bar, as soon as the action was brought upon the judgment of 1879, a writ of error could have been brought to reverse that judgment, and an application made to stay the proceedings in the action upon the judgment, until it could be determined whether or not the judgment should be reversed for error. *McCormick v. Fiske*, 138 Mass. 379. Or, after obtaining a reversal of the former judgment, a writ of review of the action on the judgment might have been applied for.

Without, however, determining that these remedies would have prevented the plaintiff from availing himself of the writ of *audita querela*, (see *Lovejoy v. Webber*, 10 Mass. 101,) we are of opinion that, as against Barton, the writ will not lie. He had nothing to do with the prosecution of the action on the judgment. While it was brought in his name, it was brought for the benefit of Rice. He received nothing from the judgment, and it would be a perversion of justice to compel him to pay what he has not received. No case has been cited to us, and we have found none, where under such circumstances a writ

of *audita querela* has availed a plaintiff. It is indeed doubtful whether, if the action on the judgment had been prosecuted by Barton to final judgment, and he had received the benefit of it, the court would by this writ order it to be paid back, unless there was a defence to the original action on the merits. See *Coffin v. Ewer*, 5 Met. 228; *White v. Clapp*, 8 Allen, 283; *Merritt v. Marshall*, 100 Mass. 244; *Bryant v. Johnson*, 24 Maine, 304; *Little v. Cook*, 1 Aik. 363.

By the terms of the report, there must be

Judgment for the defendant.

C. H. Sprague, for the plaintiff.

W. S. B. Hopkins & F. B. Smith, for the defendant.

WESLEY D. MESERVEY vs. ARTHUR H. LOCKETT.

Suffolk. March 8, 1894. — May 17, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Law of the Road.

The act of driving on the left of the centre of a road sixty feet wide is not of itself negligence, nor does it tend to show negligence or a violation of the law of the road on the part of the driver as against another person crossing the road on foot, who is accidentally injured by him.

TORT, for injuries occasioned to the plaintiff by being knocked down by a horse driven by the defendant.

At the trial in the Superior Court, before *Dewey*, J., there was evidence tending to show that on June 10, 1891, at about half-past eleven o'clock in the evening, the plaintiff, while crossing on foot a street called West Chester Park, in the city of Boston, was knocked down and injured by a horse attached to a buggy driven by the defendant. The street was about sixty feet wide, and in the centre of it was a double line of street car tracks. Between the outer rail and the curb of the sidewalk there was on either side of the tracks a space of twenty-three feet. At the time of the accident the defendant was driving on the left of the centre of the street going from Columbus

Avenue toward Huntington Avenue, and the plaintiff was crossing to the centre of the street to take a street car going in the opposite direction.

The plaintiff testified that, before leaving the sidewalk, he had looked up and down the street, but had seen or heard no team coming in either direction, and that he had gone about fourteen feet from the curb toward the car track when he was knocked down and rendered unconscious.

The defendant testified that, as he was driving on the left side of West Chester Park, he met a hansom, which he passed, turning to the right toward the street car track, and nearer the track than the curb, but not crossing the track, and just after he had passed the hansom the plaintiff came out from behind it to take the street car, which was also coming toward him, and that the plaintiff was about three feet in front of his horse when he first saw him. The presence of the hansom was controverted by the witnesses for the plaintiff. This was all the material evidence in the case.

The plaintiff requested the judge to instruct the jury:

1. If the jury are satisfied that the defendant was on the left-hand side of the middle of the travelled part of the street, and that his being there at the time of the collision was an act of negligence, or if his neglecting to turn to the right on meeting the plaintiff was an act of negligence, either of which caused the injury, the plaintiff may recover, if he was in the exercise of due care. 2. If the jury are satisfied, from the evidence, that the defendant was on the left-hand side of the street, it is evidence strongly tending to show the want of ordinary care on the part of the defendant. 3. One who violates the law of the road by driving on the wrong side of the way assumes the risk of all such experiments, and must use greater care than if he had kept upon the right side of the road. If a collision takes place, the presumption is generally against the party upon the wrong side. Especially is this true where the collision takes place in the dark.

The judge declined to rule as requested, and instructed the jury that the question of the defendant's negligence was to be determined upon all the evidence and circumstances in the case, — the place where he was, the time he was there, the width of the street, the degree of light, and the question whether there

was a hack or carriage between him and the plaintiff; that it was upon the plaintiff to show, taking into consideration all the evidence, that the defendant drove in such a way, and with such speed, as to be guilty of negligence, that is, as to be inconsistent with reasonable and ordinary care, that the uncontested evidence showed that the street was about sixty feet wide, that it had car tracks in the middle, and that on the defendant's left-hand side of the street there was a place for carriages twenty feet wide or more, and that the defendant was driving upon the right-hand side of that strip, that is, upon the side nearest to the street car; that, so far as any law of the road was concerned with reference to the plaintiff, the defendant had a right to drive there, and all that was required of him was to drive consistently with reasonable and ordinary care and prudence; that the jury were to take into account where he was, where his horse and carriage were on the street, in connection with everything else, in determining whether he was driving with reasonable and ordinary care, whether his speed was too great, and whether he looked out with due caution; and that the law did not allow the deduction that, because the plaintiff was injured although using due care, therefore the defendant must have been negligent, because it contemplates it as possible that such things happen without the fault of either party or with the fault of both.

The principle is not that, by doing something which the defendant did not do, the accident might have been avoided, for perhaps it very rarely happens that an accident occurs when, if one or the other of the parties had done differently, it might not have been avoided. But the law goes back to the time and circumstances, and asks whether, under all the circumstances, the conduct of the plaintiff and defendant respectively was such as due and reasonable care required. It does not hold them responsible for their judgment, or their conduct, as determined by the after light which a jury may have when it passes judgment.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. E. Hanly & J. F. Libby, for the plaintiff.

F. Ranney & I. R. Clark, for the defendant.

MORTON, J. We think that the instructions given by the presiding justice were correct, and were all that the case required,

and that those requested by the plaintiff were properly refused. The instructions requested by the plaintiff were based upon the view that the defendant was negligent, or violated the law of the road in being where he was. Neither proposition is correct. So far as concerned the plaintiff, the defendant had a right to be where he was, and violated no law of the road by being there. *Lloyd v. Ogleby*, 5 C. B. (N. S.) 667. *Cotterill v. Starkey*, 8 C. & P. 691. *Lovejoy v. Dolan*, 10 Cush. 495. *Broult v. Hanson*, 158 Mass. 17. *Norris v. Saxton*, 158 Mass. 46. So far as the defendant's negligence was concerned, the presiding justice properly instructed the jury that they were to "take into account where he was, where his horse and carriage were on the street, in connection with everything else, in determining whether he was driving with reasonable and ordinary care." It would have been error to instruct that his being on the left of the centre of the road was of itself evidence of negligence, or tended of itself to show negligence as against the plaintiff. Cases *ubi supra*, and *Parker v. Adams*, 12 Met. 415, 419.

Exceptions overruled.

NORTH BROOKFIELD SAVINGS BANK vs. OLIVER H.
FLANDERS.

Suffolk. March 8, 1894. — May 17, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Mortgage — Foreclosure — Authority of Bank Officer — Forcible Entry and Detainer.

If a person who purchases an estate at a sale under a power contained in a mortgage, with a provision authorizing the mortgagee to purchase at the sale, is the agent of the mortgagee, and the conveyance to him from the mortgagee and the reconveyance by him to the mortgagee are simultaneous acts, an action against the mortgagor to recover possession of the estate may be maintained by the mortgagee under the Pub. Sts. c. 175.

The treasurer of a savings bank has authority to foreclose a mortgage to the bank when directed so to do by the board of investment, if not before by virtue of his office, and his conveyance of the land to a purchaser at a sale under a power contained in the mortgage, and his subsequent acceptance of a conveyance

from his grantee, the mortgagee having authority to purchase at a sale, are merely incidental to the powers which existed, or were conferred upon him; and the bank, by accepting the deed and bringing an action to recover possession of the land, ratified his acts.

ACTION, on the Pub. Sts. c. 175, to recover possession of an estate in Chelsea.

Trial in the Superior Court, without a jury, before *Bishop, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff was the mortgagee of the estate in question under a mortgage containing a power of sale in the usual form, and with a provision authorizing the mortgagee to purchase at the sale. The mortgage being overdue, the board of investment of the plaintiff bank verbally requested one Batcheller, its treasurer, to cause the mortgage to be foreclosed, and he accordingly published notices of the sale, which he advertised to take place on a day named. Prior to the day fixed for the sale Batcheller requested one Nye to attend the sale, and to bid off the property in his own name, but for the benefit of the bank, which Nye did. Thereafter a deed in the name of the bank, signed by "Charles E. Batcheller, Treasurer," was executed and delivered to Nye, and simultaneously therewith a deed of quitclaim to the bank was executed and delivered by Nye to Batcheller for the bank. No consideration was paid by Nye to the bank, nor by the bank to Nye, for the conveyances, the sole object of the parties being to effect a foreclosure of the mortgage, and to place the title to the property in the bank. The deeds were simultaneously put on record. Nye did not have possession of the mortgage nor of the deed given to him except for the purpose of receiving delivery of it. At the time when Batcheller requested Nye to bid off the property for the bank, the method of transferring the title by deed to Nye, and from him back to the bank, was spoken of, and settled upon, and the expense of the proceedings was borne by the bank.

The plaintiff introduced in evidence the mortgage of the defendant, the deed of Batcheller to Nye, and the affidavit of sale annexed to the same, as provided in the Pub. Sts. c. 181, § 18, and the release of Nye to the bank.

At the close of the evidence the defendant asked the judge to rule: 1. That the action could not be maintained, because it did

not appear that Batcheller had any authority to execute and deliver the deed from the bank to Nye. 2. That no action could be maintained in the name of the plaintiff. 3. That upon all the evidence the plaintiff could not maintain the action.

The judge declined so to rule, and found that, upon the evidence, Nye acted as the agent and representative of the bank, and that the method taken to effect a foreclosure and to place the title in the bank constituted the process of foreclosure, and found for the plaintiff for the possession of the premises; and the defendant alleged exceptions.

J. G. Holt, for the defendant.

S. H. Tyng, for the plaintiff.

LATHROP, J. The statute under which this action is brought provides: "When a mortgage of real estate has been foreclosed by a sale under a power contained therein or otherwise, the person entitled to the premises may recover possession thereof in the manner hereinafter provided." Pub. Sts. c. 175, § 1. The subsequent provisions give a summary process by a writ issued by a police, district, or municipal court, or trial justice. If the plaintiff obtains judgment in the inferior court, and the defendant appeals to the Superior Court, he must, by § 7, give a bond or recognizance conditioned for the entry of the action, and the payment to the plaintiff, if the final judgment is in his favor, of all costs, and of a reasonable sum as rent of the premises from the day when the mortgage was foreclosed until possession of the premises is obtained by the plaintiff.

These provisions were taken from the St. of 1879, c. 237. The purpose of the statute was to furnish to the person entitled to the estate a speedy method of obtaining possession of it, in place of a writ of entry. *Lowe v. Moore*, 134 Mass. 259.

In *Warren v. James*, 130 Mass. 540, where the assignee of a mortgagee foreclosed by a sale to A., who nearly a month later sold to B., and he on the following day sold to C., it was held that C. could not maintain an action under the St. of 1879. This decision rested on the language of the recognizance or bond required to be given respecting the payment of rent. As was said by Mr. Justice Lord, in delivering the opinion of the court: "If there may be one or more intermediate conveyances, the rent could not be due for the whole time to the one who takes

the last conveyance; and if such conveyances gave a right of recovery, there might also be successive tenants of the estate, no one of whom could be liable in equity and justice to the entire rent, nor would any of the successive grantees be entitled to the whole from the present or any other tenant."

The difficulty which presented itself in *Warren v. James* does not arise where the purchaser is the agent of the mortgagee, and the conveyance from the mortgagee to him and the conveyance from him to the mortgagee are simultaneous acts. We are of opinion, therefore, that in such a case an action may be maintained under the statute.

There can be no doubt of the authority of the treasurer of the plaintiff bank to collect the debt which was due by appropriate proceedings. If he had not authority to foreclose the mortgage by virtue of his office, he certainly had such authority when authorized to do so by the board of investment; and the subsequent proceeding is merely incidental to the powers which existed in him or were conferred upon him. See *Bristol County Savings Bank v. Keavy*, 128 Mass. 298; *Holden v. Upton*, 184 Mass. 177, 179; *Smith Charities v. Connolly*, 157 Mass. 272.

But if there can be any question as to the authority of the treasurer, the plaintiff, by accepting the deed and bringing this action, has ratified his doings. *Exceptions overruled.*

JOB MONAGHAN vs. LYMAN K. PUTNEY.

Norfolk. March 9, 1894. — May 17, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Mechanic's Lien — Additional Labor to save Lien.

It cannot be said, as matter of law, that work done by a mechanic under a contract substantially performed at an earlier date is only colorable because it is trifling in amount and done with the ulterior purpose of saving his lien.

HOLMES, J. This is a petition to enforce mechanic's liens. The judge before whom the case was tried found that the liens

were established, subject to an exception to his refusal to rule, as matter of law, that there was no evidence warranting his findings. The ground on which the respondent asked the ruling was that the petitioner did not file the statements required by statute within thirty days after he ceased to labor on the houses upon which the work was done.

The statements were filed on October 13, 1890. The petitioner did his work upon two houses under a contract with one Smith, who built them for the respondent. The auditor found that the petitioner had performed the contract substantially, on or before August 23, 1890, that is, more than a month before the statements were filed, but that on September 22 and September 26 he did a small amount of additional work on the houses respectively, for the purpose of enabling himself to file his statements in season to maintain his liens. It appears by the schedule annexed to the auditor's report, that the petitioner also did a little work on one of the houses on September 5. The petitioner testified, at the hearing before the court, that he did some work at the respondent's request, and a part of his testimony would lead to the inference that this was toward the end of September. He also testified that in the middle of September he did not consider his contract fulfilled, and that he did the additional work in order to perform his contract, although he admitted that his ulterior purpose was to save his lien. If the contract had been performed at that time, probably when he consulted counsel about his lien he was in time to save it.

We cannot say that there was no evidence that the work was "done in good faith, for the purpose of completing [the] contract, and not colorably in order to revive [the] lien," in the language of *Turner v. Wentworth*, 119 Mass. 459, 464. We cannot lay it down, as matter of law, that the work was only colorable because of the ulterior purpose, or because what was done was a very trifling matter. If, as was testified, the contract did call for what the petitioner did, and if the contract had not been treated by those concerned as fully executed at an earlier date, the petitioner's lien was saved so far as his contract was concerned. It may be that the respondent's testimony would have warranted the inference that Smith's contract with the respondent was executed, and that the petitioner no longer had authority to work

upon the buildings. But we cannot draw that inference against the finding of the judge. See *Worthen v. Cleaveland*, 129 Mass. 570. *Exceptions overruled.*

C. E. Washburn, for the respondent.

W. R. Bigelow, for the petitioner.

ALBERT W. LITTLEHALE vs. FREEMAN D. OSGOOD & another.
BLANCHE W. LITTLEHALE vs. SAME.

Suffolk. March 12, 1894. — May 17, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

False Representations — Unfit Sanitary Condition of House — Exceptions.

In an action against a lessor, for alleged false representations that a house appurtenant to which was an old well filled with filthy matter was in a good sanitary condition, the burden of proof is on the plaintiff to show that the condition of the well, which was an adequate cause of disease, was the actual cause thereof, and it is not sufficient to show that it might have been the cause, but the fact must be proved, and the jury cannot act on mere conjecture or speculation.

An exception to a statement of undisputed evidence in a charge to the jury will not be sustained where the ruling as to its effect does not appear.

Where the question whether there is an implied warranty that premises let furnished are in a good sanitary condition does not appear to have been raised at the trial, it cannot be considered on exceptions.

TWO ACTIONS OF TORT, for alleged false representations by the lessors that a house was in good sanitary condition. Writs dated February 12 and 13, 1891, respectively.

Trial in the Superior Court, before *Thompson, J.*, who allowed a bill of exceptions, in substance as follows.

On December 7, 1888, the plaintiff, Albert W. Littlehale, hired the premises, furnished, of the defendants, and with his family, including his minor child Blanche, the plaintiff in the second action, entered into occupation thereof, and continued to occupy them as a tenant at will until March 3, 1890. On February 10, 1890, the female plaintiff became ill with diphtheria, and during her illness an inspector of the board of health of the city of Boston visited the premises, and detected an odor in a

water-closet in the basement of the house, the cause of which the defendants were ordered to remove. In digging under the wall of the basement, in obedience to the order, the defendants discovered an old well, partly beneath and partly outside the house, on the same side as the windows of the sleeping-room of the female plaintiff, but at the other end. The well was partly filled with water and fecal matter from the water-closet, causing a stench. The defendants immediately caused the well to be filled up, and the water-closet to be discontinued. When the well was discovered the water-closet was discharging into it through a lead trap in which were two holes that rendered it useless. The plaintiffs offered evidence tending to show a representation by the defendants of the good sanitary condition of the premises, made at the time when they entered into occupation of the same, which representation was denied by the defendants, and also evidence tending to show that the condition of the well was an adequate cause of diphtheria.

The plaintiff in the first action testified, on cross-examination, that he hired the premises for four months beginning December 7, 1888, under a verbal agreement, and that frequently during his occupancy there was an odor about the house which at times was very intense; that when he renewed his hiring nothing was said by either of the parties with reference to the sanitary condition of the premises; that none of his family used the basement water-closet; and that his daughter Blanche, until the time when she became ill, attended school in another part of the city, and in going to and from school rode on the street cars when she did not walk.

The defendants introduced evidence not material to be stated.

The judge instructed the jury, in substance, that the injury for which the plaintiffs sought to recover must be shown by them to be the result of a wrong on the part of the defendants; that it was not a matter for conjecture or speculation, but for proof, of which the plaintiffs must satisfy them affirmatively; and that it was not enough that the condition of the well might be one of the causes that would produce diphtheria, but it must appear that it was the actual cause, and that the diphtheria did result from it.

The judge further stated to the jury that considerable had

been said with regard to the contract of the parties; that the plaintiff in the first case said that in April, 1889, he renewed his hiring of the premises, when he told the defendants that he would take them for a year, and that at that time nothing was said in relation to the sanitary condition of the premises; and that the testimony of the defendants was not materially different, but that they said that the plaintiff in the first case hired the premises up to April 1, 1889, and at that time told them that he would take the premises for a year.

The jury returned a verdict for the defendants in both actions; and the plaintiffs alleged exceptions.

C. E. Hellier, for the plaintiffs.

W. A. Morse, for the defendants.

LATHROP, J. These cases appear to have been tried on the count in each declaration which alleges a false representation made by the defendants to the plaintiff in the first case to the effect that the house was in good sanitary condition. Whether such a representation was made was in controversy. The bill of exceptions on this point is as follows: "The plaintiffs offered evidence tending to show a representation by the defendants of the good sanitary condition of the premises, made at the time when they entered into occupation of the same, which representation was denied by the defendants."

No question of law arises in the case except as to the correctness of two portions of the charge to the jury; and there is nothing to show that the extracts given contain all that was said on the subjects to which they relate.

There was evidence that the plaintiff in the second case was taken ill with diphtheria, and that, on investigation, an old well was discovered on the premises partly filled with filth and fecal matter, and there was also evidence tending to show that the condition of the well was an adequate cause of the diphtheria. There was also evidence that the plaintiff in the second case, up to the time she was taken ill, attended school in another part of the city, using the street cars when she did not walk.

The first ruling complained of was, in effect, that the burden of proof was on the plaintiffs to show that the well was the cause of the diphtheria; that the jury could not act on conjecture or speculation, but the fact must be proved; and that it was not

enough to show that it might be the cause. As we have already said, it does not appear that this was all that was said on the subject. Nor does it appear that the plaintiffs requested further instructions, which were refused.

We see no error in the instructions given. While a jury may draw inferences from facts proved, because in many cases the main fact in issue can be proved in no other way, yet it cannot act on mere conjecture or speculation. *Corcoran v. Boston & Albany Railroad*, 133 Mass. 507. *Tyndale v. Old Colony Railroad*, 156 Mass. 503. *Chandler v. New York, New Haven, & Hartford Railroad*, 159 Mass. 589. *Felt v. Boston & Maine Railroad*, *ante*, 311.

The remaining exception is to a portion of the judge's charge, which merely states the testimony on the question whether there was a new hiring after the plaintiff in the first case took possession of the premises. What the judge ruled that the effect of this evidence would be, which was not contradictory, does not appear.

At the argument in this court the plaintiffs contended that, as the premises were let furnished, there was an implied warranty that they were in good sanitary condition. See *Ingalls v. Hobbs*, 156 Mass. 348. But no question of this sort was raised at the trial, so far as the bill of exceptions shows, and we have no occasion to consider whether the doctrine of that case would apply when a house is rented for a year. *Exceptions overruled.*

GOULD ANTHONY, executor, *vs.* BENJAMIN P. ANTHONY
& others.

Bristol. March 13, 1894. — May 17, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

*Real Action — Foreclosure of Mortgage — Payment — Adverse Possession —
Evidence — Declaration of Parties — Statute of Limitations.*

The statute of limitations is not a bar to a writ of entry to foreclose a mortgage brought by a mortgagee against a mortgagor, unless it appears that the mort-

gagee was disseised by the mortgagor twenty years or more before the action was brought.

At the trial of a writ of entry to foreclose a mortgage brought by a mortgagee against a mortgagor, in which the defences relied on were adverse possession of the premises maintained for more than twenty years prior to the commencement of the action, and payment or satisfaction of the mortgage debt, it appeared that the mortgage was executed in 1860; that the mortgagee, who was a resident of Rhode Island, died in 1870, and that his will was there admitted to probate in 1871, the demandant being appointed one of the executors; that in March, 1892, the will was admitted to probate in Massachusetts, and the demandant was appointed executor here, and in June, 1892, brought the writ of entry to foreclose the mortgage; and that in 1878 a third person, acting under a power of attorney from the executors appointed in Rhode Island, made an open and peaceable entry upon the mortgaged premises, in the presence of two witnesses, for the purpose of foreclosing the mortgage, and caused a certificate to be made and recorded in accordance with the statute, and on the same occasion had an interview with the widow and daughter of the mortgagor, who were then living on the premises, at which time a lease of the property for one year, running from the executors of the mortgagee to the widow of the mortgagor, signed for the lessee by the hand of her daughter, one of the tenants in the action, was executed, and afterwards held by the executors, and at the same time the widow and daughter of the mortgagor were told that the executors were taking proceedings to foreclose the mortgage. *Held*, that evidence of the action of the executors was competent on the question whether the tenants had been in adverse possession of the property for twenty years prior to the beginning of the action, and on the question whether there should be a presumption of payment of the mortgage from lapse of time. *Held, also*, that declarations and admissions of the widow of the mortgagor, who after his death was an owner of an interest in the mortgaged premises, and continued in the occupation of them until her death, tending to show the nature of her occupation, were competent to be considered in connection with her conduct in remaining there upon the question whether there should be a presumption of payment of the mortgage, and whether her possession was adverse to the mortgagee.

WRIT OF ENTRY, dated June 18, 1892, to foreclose a mortgage of a parcel of land in the town of Dartmouth, brought by the executor of the will of Jonathan Anthony, the mortgagee, against the heirs at law of the mortgagor, Reuben Anthony. Pleas as to all the tenants, *nul disseisin*, and that on April 6, 1860, the mortgagee purchased the demanded premises for the mortgagor, who was his son, and at the same time induced his son to execute to him a mortgage thereof; that the demanded premises were purchased on the understanding and agreement that the son was to accept and receive them as his full portion of his father's estate; that the mortgage was not given or received as security for a debt, or for money paid or loaned by the mortgagee to the mortgagor, but was given on the express under-

standing that the mortgagor was not to be called upon to pay it, but that it was shortly to be cancelled and discharged, and that no payment had ever been made upon the principal or interest thereof.

One of the tenants, Benjamin P. Anthony, further alleged that the title and possession of the demanded premises had been in himself as the heir at law of Reuben Anthony by open, peaceable, and adverse possession for a period of more than thirty years prior to the commencement of the action.

By an amendment to their answer the tenants further alleged that if anything ever was due upon the mortgage the same had been paid.

Trial in the Superior Court, without a jury, before *Hopkins, J.*, who allowed a bill of exceptions, in substance as follows.

The demandant introduced evidence of the execution of a mortgage of the demanded premises, on April 6, 1860, by Reuben Anthony to his father, Jonathan Anthony, the demandant's testator, for \$1,600.

For the tenants, one Thomas Innman testified that Jonathan Anthony was the father of Reuben, Gould, Joseph, Martha, and Galloupe Anthony; that Reuben bought the demanded premises, which was a farm, in 1860; that thereafter the witness, who had lived on the farm himself, had several conversations with Jonathan Anthony about it, in the first of which Jonathan asked him if he thought Reuben could get a living there and support his family, to which the witness replied that he did not see how he could do it if he had to pay \$90 or \$100 interest, and that Jonathan then said that he did not intend that the mortgage should ever trouble Reuben; and that it was put on the farm to prevent him from making away with it. In a later interview, the mortgagee said that the note or mortgage would never be collected; that the farm belonged to Reuben and his family; and that the mortgage was put on as a safeguard.

Martha A. Albro, a sister of the mortgagor and the daughter of the mortgagee, testified that her father said he would give Reuben the place if he would sign off that he had got his part; and, in response to her inquiry of him as to why he took a mortgage from her brother, he said that he had not intended to take any mortgage, but that Gould and Joseph thought that he had

better do so, as Reuben once in a while would drink too much ; and that then, and once or twice later, her father said that he should give the mortgage back.

Edmund Mosher testified that he was the husband of a daughter of Reuben Anthony, and that, in a conversation in 1865 with Jonathan Anthony regarding the mortgage, the latter said he had bought a farm in Dartmouth for Reuben and his children, and he meant them to have it ; that Gould and Joseph thought that he had better take a mortgage on it, but that, as he put it on as a safeguard, he was going to take it off ; and that after Reuben's death his son Benjamin P. Anthony had run the farm, and his mother, Reuben's widow, had lived with him there until her death. On cross-examination he testified that he did not know that Mary Ann Anthony, the widow of Reuben, ever had a lease, and that he was not present when she signed a lease, and did not remember whether he signed the lease as a witness, and was uncertain as to whether he was present on any of the occasions when William Barker visited the farm.

Abby F. Mosher, a daughter of Reuben Anthony, testified that she heard conversations between her father and grandfather regarding the mortgage, the first of which was about a year after her father had gone to live on the farm ; and that her father asked her grandfather to give him up that mortgage, to which her grandfather replied, " I will, Reuben ; I bought the farm for you for your lifetime, and for your children to have it after you." Substantially similar statements were afterward made by the mortgagee in the hearing of the witness, who never heard her father or grandfather say anything about paying the mortgage ; that, after the death of her father, her brother Benjamin managed the farm ; and that her mother did nothing more than keep house for her brother, who supported her. On cross-examination, the witness testified that all of the foregoing conversations took place within two years after the purchase of the farm.

Benjamin P. Anthony, a son of Reuben Anthony, and one of the tenants, testified that in 1860 his grandfather was talking of buying a farm for his father, and that after their return from an examination of the farm in question, which they had heard was for sale, he heard his father say to his grandfather, " Father,

if you will buy me that place and give it to me free and clear, a warranty deed of it, I will sign off from your property, but I had n't ought to. It is nothing like the rest will have." Two or three weeks later his grandfather bought the farm, and said, "Well, Reuben, I have taken you up at your offer; I have bought the place, and you can move into it as quick as you mind to."

The witness further testified, that afterward, when his father was living upon the farm, his grandfather occasionally came there, and that several times, when asked by his father to give up the mortgage, his grandfather said that he meant him to have the place; that he did not take the mortgage for any gain of his own, but for his son to have it for his lifetime, and for his children afterward; that his grandfather never asked for any interest or the principal on the mortgage; that after the death of Reuben, on October 29, 1872, the witness carried on the farm himself, paid the taxes, cut the wood and sold it, repaired the buildings, and built a barn; that since the death of his father no one had asked him for principal or interest on the mortgage, and he had never paid any; and that his mother did nothing more about the farm than the general housework.

On cross-examination the witness admitted that he had received a letter from Gould Anthony forbidding him to cut wood on the farm, to which he had paid no attention; that William Barker came to the farm about three years before the trial, and said that Gould Anthony and Robert wanted to know if the witness desired to buy the place, to which he replied that he considered that he owned it; that he was positive that his mother, Mary Ann Anthony, never gave a lease of the place; that there was no arrangement by which he was to stay there and keep the buildings in repair and pay the taxes in lieu of rent, but that since the death of his father he had run the place, and considered it as their own.

In rebuttal, the demandant testified that he was the son of Jonathan Anthony and co-executor with Joseph Anthony of his will; that his father died on December 18, 1870; that in 1878 the witness, with his brother Joseph, as executors, gave a power of attorney to William Barker, who foreclosed the mortgage, and gave a lease of the demanded premises to Mary Ann Anthony,

the widow of Reuben, who died in 1872; that he wrote letters to his nephew, Benjamin P. Anthony, one of the tenants, forbidding him from thereafter cutting or selling wood, and stating to him that he thought that, if he, Benjamin, would pay to another nephew of the demandant, Robert W. Anthony, a certain amount of rent, the latter would not sell the place; and that Benjamin and his mother could have the witness's part of the place rent free.

On cross-examination, he testified that he had no directions from his father regarding the mortgage, and that his father never directed him not to foreclose, or to give the mortgage up and cancel it.

William Barker testified, that on December 13, 1878, he went to Reuben Anthony's place for Gould and Joseph Anthony, for the purpose of entering to foreclose the mortgage, and with a view of leasing the farm, and at that time he went to the house and saw Benjamin Anthony and Mrs. Anthony, and the conversation between them was, in substance, that Gould and Joseph Anthony desired that something should be done by way of asserting their claim, and proposing to lease the premises to the widow of Reuben Anthony.

On cross-examination, he testified that he read the lease to Mary Ann Anthony, but that he was not certain that she signed her name to it; that he thought she gave directions to her daughter to sign it for her; that he could not say whether she said she would not sign the lease, or whether he let Mrs. Mosher, her daughter, read it before signing her mother's name; that he could not tell whether Mrs. Mosher knew what she was signing her mother's name to or not, unless she was present when it was read, and he did not remember whether she was or not; that he thought Benjamin Anthony was present when the lease was signed, although he was not certain; that at the time of taking the lease no claim was made by Mrs. Anthony or Benjamin that they owned the farm; and that no claim had ever been made by Benjamin or any of the other heirs, or by the widow of Reuben, adverse to the claim of the executors, except that within the two years prior to the trial Benjamin had claimed that the farm belonged to him.

Jonathan A. Sisson, a grandson of Jonathan Anthony, the

mortgagee, testified that, in March, 1867, he heard Reuben ask the mortgagee if he would give him up the note and mortgage, to which the mortgagee answered, "No, I shall not, unless you pay it, which I don't think you ever will, — you know you were not to have but two thousand dollars," and Reuben replied, "I know it"; that the mortgagee then added, "You know I gave more for the farm than I intended to"; and that in May, 1867, the mortgagee asked the mortgagor if he could pay him any money on the mortgage, and the mortgagor said, "No, for I haven't got it."

Phœbe Goddard testified that, in a conversation between Mary Ann Anthony and Joseph Anthony, twelve or thirteen years before the trial, the former said that her son had the hay all cut and stacked, but that the barn leaked so badly that it was unfit to put the hay in, and that he did not want to go to the expense of repairing unless he could stay there through the winter; and that Joseph told her to tell Benjamin to repair the barn and put in his hay, and he would make it all right with Gould.

Jane H. Sisson testified that Mary Ann Anthony came to her house in Portsmouth, Rhode Island, in 1881, and said that she had come to have an understanding with Joseph Anthony in regard to the farm she then occupied, and asked her if she knew what they were going to do about foreclosing the mortgage; that after her return from an interview with Joseph, in response to an inquiry as to what conditions had been agreed on, she replied that she was not to be disturbed during her life, provided the taxes were paid, and the place was kept in decent repair.

Sarah A. Anthony testified that about fourteen or fifteen years before the trial she heard a conversation between Mary Ann Anthony and Joseph Anthony, at the house of the latter in Portsmouth, Rhode Island, in which she said that she would fix the barn if she and her son could stay there longer, but did not want to put out any money if they could not; and that he told her that they could stay there if they would pay the taxes, and would cut only wood enough to burn, and sell none, and do what was right by the place.

Abbie F. Mosher, who signed the lease in behalf of Mary Ann Anthony, being recalled, testified that, in reply to her inquiry as to what the paper was which William Barker desired her

to sign, he said: "It is to show we are about to foreclose the mortgage, and that I have notified your mother; she knows it, and you need not stop to read it." She further testified, that her brother Benjamin P. Anthony was not present at her house when the lease was signed by her.

Benjamin P. Anthony, recalled, testified that he never was present when Barker produced a paper, and asked his mother to sign it. This was all the material evidence in the case.

It was admitted at the trial that the will of Jonathan Anthony, who at the time of his death was a resident of Portsmouth, Rhode Island, was, on March 4, 1892, admitted to probate in Massachusetts, and Gould Anthony, the demandant, was appointed the executor thereof.

The judge found for the demandant; and the tenants alleged exceptions.

E. Avery, (T. F. Desmond with him,) for the tenants.

W. M. Butler, for the demandant.

KNOWLTON, J. This is a writ of entry to foreclose a mortgage, tried before a justice of the Superior Court without a jury. The tenants excepted to the refusal of the court to rule that there was no evidence to warrant a finding for the demandant, and to certain rulings in regard to the admission of evidence. The defences principally relied upon were the statute of limitations, adverse possession of the premises maintained for more than twenty years prior to the commencement of the suit, and payment or satisfaction of the mortgage debt. The statute of limitations was not pleaded, and this fact alone might be a sufficient answer to the tenants' claim under it at the trial. Moreover, this statute is not a bar to a writ of entry brought by a mortgagee against a mortgagor, unless it appears that the mortgagee was disseised by the mortgagor twenty years or more before the action was brought. *Bacon v. McIntire*, 8 Met. 87.

The lapse of time since the mortgage debt became due was such as to furnish a presumption of payment had there been no explanation of it. *Kellogg v. Dickinson*, 147 Mass. 432, 437. But the evidence showed very clearly that the debt had not been paid. Indeed, the tenant contended that the mortgagee never intended to exact payment, nor to have the mortgage enforced. There was also evidence to justify the court in find-

ing that the mortgage was never satisfied otherwise than by payment. This finding of fact we cannot revise, and the correctness of it we have no occasion to question.

On the question whether there was a disseisin and an adverse use by the mortgagor and those claiming under him, continued for twenty years, there was ample evidence to warrant the finding against the tenants. See *Holmes v. Turner's Falls Co.* 150 Mass. 535, 548.

Jonathan Anthony, the mortgagee, a resident of Portsmouth, Rhode Island, died on December 17, 1870; his will was admitted to probate there on February 13, 1871, and Gould Anthony, the demandant, and Joseph Anthony, were appointed executors. On March 4, 1892, the will was proved in Massachusetts, and the demandant was appointed executor here. On December 13, 1878, one William Barker, acting under a power of attorney for the executors appointed in Rhode Island, made an open and peaceable entry upon the mortgaged premises, in the presence of two witnesses, for the purpose of foreclosing the mortgage, and caused a certificate to be made and recorded in accordance with the statute, and on the same occasion had an interview with the widow and a daughter of the mortgagor, who were then living on the premises. There was some conflict of evidence as to what occurred at this interview, and as to whether the tenant, Benjamin P. Anthony, was present. But there was evidence that a lease of the property for one year, running from the executors to Mary Ann Anthony, the widow of the mortgagor, signed for the lessee by the hand of her daughter, one of the tenants in this action, was then executed, and afterwards held by the executors. There was testimony that the widow and daughter of the mortgagor were told at that time that the executors were taking proceedings to foreclose the mortgage. The tenants objected, and excepted to the admission of evidence of the proceedings in this attempt to foreclose.

It is clear that executors appointed in another State cannot foreclose a mortgage in Massachusetts, and it is equally clear that, by their appointment in the place of the testator's domicile, they acquire such a title to his personal property everywhere that they can properly receive and collect it, or take measures for the care and preservation of it, and take it to the place of

their appointment, so far as this can be done without the aid of legal proceedings, if their action does not interfere with the rights of local creditors where the property is found. *Cutter v. Davenport*, 1 Pick. 82, 85. *Hutchins v. State Bank*, 12 Met. 421, 424. We are of opinion that the action of the executors was competent evidence on the question whether there should be a presumption of payment of the mortgage from lapse of time, and on the question whether the tenants had been in adverse possession of the property for twenty years prior to the bringing of this suit.

The only other exception which was argued was to the introduction of conversations and admissions of Mary Ann Anthony. She was the widow of the mortgagor, and after his death was an owner of an interest in the mortgaged real estate. There was evidence tending to show that she continued in the actual occupation of the estate so long as she lived. The natural inference from the facts shown is, that her occupation, except as it was affected by the lease from the executors in Rhode Island, was under the provisions of Pub. Sts. c. 124, § 13, which permitted her to occupy with the rights of a tenant in common so long as there was no objection on the part of the heirs. It was contended by the tenants that this occupation was adverse to the demandant. Under these circumstances, her declarations which tended to show the nature of her occupation were competent to be considered, in connection with her conduct in remaining there, upon the question whether there should be a presumption of payment of the mortgage, and whether her possession was adverse to the mortgagee.

Exceptions overruled.

GEORGE W. THAIN vs. OLD COLONY RAILROAD COMPANY.

Suffolk. March 15, 1894. — May 17, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Assumption of Risk.

The plaintiff, a locomotive engineer, was injured while on duty by being carried against a wooden post standing four feet from the track and two feet from the tender beam where he was at the time. The post had been put up about a week before the accident as a temporary support to a bridge, and the plaintiff, who was an experienced engineer, had passed it daily, but did not know that it was there. *Held*, that the plaintiff took the risk of the injury, and that the defendant was not liable. *Held, also*, that a rule of the defendant forbidding the piling of obstructions within six feet of the track would, if proved, be immaterial.

HOLMES, J. The plaintiff, an engineer employed by the defendant, was injured while on duty by being carried against a wooden post standing four feet from the track and two feet from the tender beam, where the plaintiff was at the time. The post had been put up as a temporary support to Hogg Bridge, Roxbury, about a week before, and the plaintiff testified that he did not know of it. The question is whether the judge was right in taking the case from the jury.

It is necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. Parallel tracks usually must be laid near enough to each other to create a similar danger between trains moving in opposite directions. A company is not bound to give warning of every such structure to every person employed upon its trains. There must be some point within the limit which it is possible for a man on a train to reach at which the railroad company has a right to build without notice, and to assume that those on the trains will keep out of the way. Every one knows that there is danger as soon as he gets outside of the line of the train when it is in motion. The plaintiff admitted it, and on that ground it is held that a passenger puts any part of his person beyond that line at his peril. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18.

We assume that the rule is not so strict in the case of employees whose duties may require them not to confine themselves within the same line at all times. *Scanlon v. Boston & Albany Railroad*, 147 Mass. 484. *Nugent v. Boston, Concord, & Montreal Railroad*, 80 Maine, 62. *Johnson v. St. Paul, Minneapolis, & Manitoba Railway*, 43 Minn. 52. *Georgia Pacific Railway v. Davis*, 92 Ala. 300. *Chicago & Iowa Railroad v. Russell*, 91 Ill. 298. *Graham v. North Eastern Railway*, 18 C. B. (N. S.) 229. It may be that they ought not to be held to take the risk of things four feet off in all cases. But we are of opinion that the plaintiff took the risk of things at that distance. He was an experienced engineer and knew this road as it was. He had passed the post in question daily for a week. There were other structures as near or nearer to the track. The permanent iron posts under the bridge where he was hurt were within less than four feet of one of the tracks. Outward trains on the other side of the plaintiff's train came nearer to it than the post. Every material circumstance which existed in *Lovejoy v. Boston & Lowell Railroad*, 125 Mass. 79, existed here. The plaintiff knew and appreciated the general danger from permanent structures. *Scanlon v. Boston & Albany Railroad*, 147 Mass. 484, 488. The only thing of which he was ignorant was the presence of this particular post. The plaintiff *Lovejoy* testified to similar ignorance on his part. *Lovejoy v. Boston & Lowell Railroad*, 125 Mass. 79. There was nothing hidden about the danger which made it a trap, as it was held with some hesitation that the jury might find to be the case in *Ferren v. Old Colony Railroad*, 143 Mass. 197, 200, where the plaintiff was pushing a car between the track and a building which stood obliquely, and gradually approached it. We must follow the authority of *Lovejoy v. Boston & Lowell Railroad*. See also *Fisk v. Fitchburg Railroad*, 158 Mass. 238, 239; *Goldthwait v. Haverhill & Groveland Street Railway*, 160 Mass. 554; *Brown v. Chicago, Rock Island, & Pacific Railway*, 69 Iowa, 161, 163; *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478, 482, 483; *Tuttle v. Detroit, Grand Haven, & Milwaukee Railway*, 122 U. S. 189, 194, 195.

A rule of the defendant forbidding the piling of obstructions within six feet of the track, if proved, would not affect

our view of the case. The other exception argued becomes immaterial.

Judgment on the verdict.

R. M. Morse, (C. E. Hellier with him,) for the plaintiff.

J. H. Benton, Jr., for the defendant.

NANCY H. CAZNEAU vs. FITCHBURG RAILROAD COMPANY.

Middlesex. March 19, 1894. — May 17, 1894.

Present: HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Rights of Passenger — Defects on Station Grounds.

In the absence of knowledge that only one safe path has been provided by a railroad corporation for leaving a passenger station, and of any notice or direction to take a particular path, a passenger may use any path which appears to be designed and used as a way to the street, and as to him the corporation is bound to see that all such paths are reasonably safe.

TORT, for personal injuries, sustained on July 9, 1892, by falling upon a stake on the station grounds of the defendant at Waverly. At the trial in the Superior Court, before *Sherman, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

G. A. Torrey, for the defendant.

W. F. Bacon & J. C. Ivy, for the plaintiff.

BARKER, J. The station at which the plaintiff alighted from the defendant's train was one which neither she nor her companion had visited before. It stood on the southerly side of the tracks, and the station grounds were bounded on the south and west by highways. There was a wrought gravel walk, with a curbstone, between the station and the tracks, and leading westerly, parallel with the tracks, out to the street. This walk was the only path made by the defendant for persons walking to and from the station. Upon leaving the train the plaintiff and her companion alighted upon this walk, and went thence to the platform of the station building, and passed around the easterly end of the building to its southerly side, where they inquired of

some person not connected with the defendant for the residence of a friend whom they intended to visit. The person inquired of was unable to inform them, but suggested that they could ascertain at the post office, which he pointed out, and which was nearly opposite the station, across the street, south of the station grounds. Extending from this street to one of the doors on the southerly side of the station was a narrow and somewhat winding footpath, which had been used by foot travellers a great many years. It had been the travelled way from the street to the post office when the latter had been near the spot now occupied by the station, and it had not been obliterated, but since the removal of the post office to the south side of the street the path had been in constant use by persons passing between the street and the station, so that the path was obvious, and throughout its length bore evidence of use by foot passengers. The station building, although new, was substantially finished and in use; but the grading and the preparation of the grounds had not been completed. The grounds between the station building and the street on the south were in a rough and unfinished condition, with loose gravel and large stones thereon. They were open and unfenced, and furnished the only means of access to the station for teams and carriages. The footpath through them was in some places covered with gravel, and in some places still exposed to view. The plaintiff and her companion, after receiving the information stated, went to the southeasterly corner of the station and saw the condition of the grounds and the footpath described. From the east and south sides of the station there was no path to the street on the south except this footpath; and there was no other way out of the station grounds visible from those sides of the station. The plaintiff and her companion started to walk by the footpath to the street upon the south, and the plaintiff tripped upon a grade stake set by the defendant's engineer in the path, and was hurt.

X The service for which the plaintiff paid the defendant included not only transportation in its cars to the station, but the furnishing of a reasonably safe way on which she could leave the defendant's grounds. In the absence of knowledge that only one such way had been provided by the defendant for that purpose, and in the absence of any direction or notice from the defendant

to use a particular path in leaving, the plaintiff was at liberty to use any path which appeared to be designed for the use of foot passengers; and as to her the defendant was bound to see that all such paths were reasonably safe and convenient for her use which a person in her situation, and unacquainted with the fact that only one path was in fact furnished by the defendant for that use, would naturally and reasonably be expected to take. Whether the path which she did take was such a path, and whether, in attempting to walk over it in the condition in which it then appeared to be, she was in the exercise of ordinary care, and whether the path itself was reasonably safe and convenient, were matters for the jury. *X* The court rightly refused to order a verdict for the defendant. *Exceptions overruled.*

THOMAS GARHAM & another vs. MUTUAL AID SOCIETY.

Suffolk. December 14, 15, 1893. — May 18, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Beneficiary Association — Receiver — Distribution of Funds — Attachment.

By a decree of the Superior Court a receiver was appointed for a society purporting to be organized under the provisions of chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, having its location in the city of Manchester in that State, and its principal place of business in the city of Boston in this Commonwealth, the object of whose incorporation was to institute lodges throughout the State of New Hampshire and other States and Territories for friendly co-operation and moral and social improvement; to collect and accumulate a fund from which any person holding a certificate of the corporation might be entitled to receive a sum not exceeding \$100, according to the terms and conditions of the certificate; to buy, sell, hold, improve, and lease real estate, personal property, and other property necessary or incident to the conduct of such business, and to carry on the business of general brokers in stocks, securities, shares, certificates, bonds, and choses in action, and in buying and selling the same. The receiver was authorized to take possession of the property and effects of the corporation, to collect all debts due to it, and to distribute the funds among its creditors under the direction of the court. The corporation was directed to deliver to the receiver all assets and property of any kind or nature belonging to the corporation within this Commonwealth, and to execute and deliver to him conveyances and assignments of all its assets and property not within this Commonwealth. Notice was ordered to be sent to

all claimants and certificate holders, whose names appeared upon the books of the corporation and who were in good standing, and to be published in certain newspapers, to all claimants and certificate holders to appear and present their claims at a time and place named, before the receiver, who was authorized to hear and pass upon them. *Held*, that it was evident from the proceedings of the court, that it intended that the receiver should collect and receive property of the corporation found outside of the Commonwealth, as well as within it, and that holders of certificates resident in other States than this Commonwealth should present and prove their claims before the receiver.

- A decree of the Superior Court entered upon the report of the receiver of a corporation purporting to be organized under chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, the object of whose incorporation was the institution of lodges throughout the State of New Hampshire and elsewhere for friendly co-operation and moral support, for the collection and accumulation of a benefit fund payable to certificate holders according to the terms and conditions of the certificate, and, as incident to the management of such fund, for the purpose of dealing in real and personal estate and of carrying on the business of general stockbrokers, provided that under the constitution and by-laws of the society all certificate holders who, at the time of the filing of the bill asking for the appointment of a receiver had failed to pay any assessment, including the last one levied, for thirty days after the same was called, and had not been reinstated under the by-laws, must be deemed to have retired of their own motion before the court intervened, and be treated as no longer members in good standing, and held to have no interest in the fund to be distributed. *Held*, that though this was a different rule from that laid down in New Hampshire where the corporation was organized, it was substantially the same rule as that declared in this Commonwealth in *Fogg v. United Order of the Golden Lion*, 156 Mass. 431, and was correct.

It is doubtful whether an association purporting to be organized under chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, and having its principal place of business in this Commonwealth, the object of whose incorporation is the institution of lodges throughout the State of New Hampshire and elsewhere for friendly co-operation and moral support, for the collection and accumulation of a benefit fund payable to certificate holders according to the terms and conditions of the certificate, and, as incident to the management of such fund, for the purpose of dealing in real and personal estate and of carrying on the business of general stockbrokers, can be called a fraternal benefit corporation within the meaning of St. 1888, c. 429, or whether it was legally established as a corporation under the laws of the State of New Hampshire. If it is not a corporation, it is a voluntary association of individuals doing business in this Commonwealth under a constitution and by-laws to which all the members have assented, and by which their membership is to be determined, and the members must be regarded either as partners or co-owners of the property, and if the association is not strictly a partnership the property on its dissolution must be distributed among the members in much the same manner as if it were a partnership.

The filing of a bill in this Commonwealth against a corporation, and the appointment of a receiver therefor, do not dissolve valid attachments of its property theretofore made, whether in this Commonwealth or elsewhere.

- A corporation purporting to be organized under chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, with its location in Manchester in that State and its principal place of business in this Commonwealth,

the object of whose incorporation is the institution of lodges throughout the State of New Hampshire and elsewhere for friendly co-operation and moral support, for the collection and accumulation of a benefit fund payable to certificate holders according to the terms and conditions of the certificate, and, as incident to the management of the fund, for the purpose of dealing in real and personal estate, and of carrying on the business of general stockbrokers, has, it seems, its actual home in this Commonwealth, and its funds held for the benefit of holders of certificates should be distributed here, so far as the court has power to do this; and it is equitable and more nearly according to the analogy of the provisions of St. 1890, c. 321, relating to the insolvency of foreign corporations, that they should be proportionately distributed among the holders of certificates without regard to their place of residence, and that certificate holders and creditors who have valid attachments or have made proof of claims elsewhere should not be allowed to prove their claims unless the attachments are discharged, or the proofs cancelled, or the property attached or against which proofs have been made is delivered to the receiver here.

FIELD, C. J. This case comes before us on the report of the Chief Justice of the Superior Court, and the questions reported relate to a decree entered in that court on the receiver's second report. For the proper understanding of these questions it is necessary to refer to the receiver's second report, which refers to his first report and to the general nature of the suit.

The suit was brought in the Superior Court by two holders of benefit certificates of the Mutual Aid Society against that society, which is described as "a corporation organized under the laws of the State of New Hampshire, and having its usual place of business in Boston, in said county of Suffolk," and against all the officers of that society, who are described as inhabitants of this Commonwealth. The certificates were issued in the name of the society, and in them the Supreme Lodge of the society promised to pay to the member named therein, being a member of a subordinate lodge, out of its benefit and reserve funds, a sum not exceeding \$100, upon the condition that he shall comply with all the laws, rules, and regulations governing said subordinate lodge and its funds, and with all future laws that may be enacted by the Supreme Lodge governing said subordinate lodge and funds, and upon the surrender of his certificate at its legal termination; provided that said member is in good standing, etc. We understand that the Supreme Lodge is the corporation, so far as the Mutual Aid Society purports to be a corporation, although members of subordinate lodges are called members of the order.

The bill in effect alleges that the funds in the possession of the society are not sufficient to pay in full all certificates which have matured; that the society is paying a large number of them in full; that the funds in the hands of the society are likely to be in this manner wasted, and used for the payment of some certificate holders to the exclusion of others; that some of the funds of the society have been attached by certain certificate holders, and that the funds are being used illegally and improperly, and contrary to the trust upon which they are held, in paying certain preferred persons to the exclusion of others; and it prays that a receiver may be appointed to take charge of the funds of the society, in order that they may be distributed under the direction of the court, in accordance with law, to the various persons entitled to receive them; and it also prays that the officers may be enjoined from paying to any person any sum of money on account of benefit certificates, and for such other and further relief as the necessities of the case may require.

The society and the other defendants appeared and answered, and at the conclusion of the answer the society says, "that by reason of such attachments it believes the funds will not be equitably and properly distributed, and by reason thereof it says it is not opposed to the appointment of a receiver, and the winding up thereof according to law." A decree was entered appointing a receiver to take possession of the property and effects of the corporation; to take charge of and collect all debts due or which might become due to the corporation; and to distribute the funds among the creditors of the corporation under the direction of the court; and the receiver was empowered to prosecute and defend suits in his own name or in the name of the corporation, and to do all acts which might be necessary to convert the property of the corporation into money; and the corporation and its officers were directed to deliver to the receiver all assets, funds, securities, evidences of property, and all property of any kind or nature belonging to the corporation within this Commonwealth, and forthwith to execute and deliver to said receiver and his successor or successors in said office full and absolute conveyances and assignments of all assets, funds, securities, claims, and demands, and of all other

property and property rights, real or personal, of the corporation which are not within this Commonwealth. The court ordered notices to be sent to all claimants and certificate holders whose names appeared upon the books of the society and who were in good standing, and notices to be published in certain newspapers requiring all claimants and certificate holders to appear and present their claims, at a time and place named, before the receiver, who was authorized to hear and pass upon the claims; and it decreed that all claims not presented before a certain time named should be forever barred, unless further time was granted, for good cause, by the court.

It is evident, from the proceedings of the court, that it intended that the receiver should collect and receive property of the corporation found outside of the Commonwealth as well as within it, and that holders of certificates resident in other States than this Commonwealth should present and prove their claims before the receiver.

The receiver's reports show that six persons, described as of this Commonwealth, entered into articles of agreement for the purpose of becoming a corporation under the name of the Mutual Aid Society, according to the provisions of chapter 152 of the General Laws of New Hampshire of 1878. This agreement provided that the location of the corporation should be in the city of Manchester, in the State of New Hampshire, but that an office should be established in Boston, Massachusetts, where the principal business should be carried on; that the amount of capital stock should be \$1,000, divided into twenty shares of \$50 each; and that the object of the corporation should be in substance as follows: to institute lodges throughout the State of New Hampshire and other States and Territories for friendly co-operation and moral and social improvement; to collect and accumulate a fund from which any person holding a certificate of the corporation may be entitled to receive a sum not exceeding \$100, according to the terms and conditions of said certificate; to buy, sell, hold, improve, and lease real estate, personal property, and other property necessary or incident to the conduct of such business, and to carry on the business of general brokers in stocks, securities, shares, certificates, bonds, and other choses in action, and in buying and selling the same.

The constitution and by-laws governing the supreme, grand, and subordinate lodges are annexed to the receiver's first report. The Mutual Aid Society is thereby empowered to grant charters for all subordinate lodges. One object of the society is declared to be "to establish a fund, from which members of this organization who have complied with all its laws, rules, and regulations may receive an amount not exceeding \$100 on each certificate when they have held a continuous membership in the order for six months." All the certificates seem to have been issued under this constitution and these by-laws, and we understand that each certificate matures at the end of six months of continuous membership. The officers of the Supreme Lodge are authorized to issue calls for such assessments "as the Supreme Lodge treasury may from time to time require," and the secretary and treasurer of each subordinate lodge are required to collect these assessments from members of that lodge, and to forward the amount to the Supreme Treasurer, who is an officer of the Supreme Lodge. There appear to be a maturity fund and a reserve fund created out of these assessments, and these are, we infer, what are called the benefit and reserve funds. The maturity fund and the reserve fund are intended, as we understand, to be used exclusively for the payment of maturing certificates. There is also a general fund provided for, which we infer is to be used for paying the general expenses of the supreme, grand, and subordinate lodges. We infer that this general fund is in great part made up from the charter fees and quarterly dues paid by members of the subordinate lodges.

The receiver reports that, in examining the books of the corporation, no separation seems to have been made between the general fund and the benefit fund, and that the assets turned over to him by the Supreme Lodge, except those received from the Winthrop National Bank, were in the form of certificates of deposit, checks from subordinate lodges, and cash; and that no distinction has been made between creditors who are certificate holders and creditors for rent, salary, etc.; but the rights of creditors, as distinguished from those of certificate holders, are not before us. It appears that the receiver has in his possession some property from lodges organized in other States than this Commonwealth; that there are twenty-three subordinate lodges

of the society in several different States, but it does not appear that any have been organized in the State of New Hampshire; that the receiver appointed here has been appointed receiver of the corporation by the Supreme Court of the State of New Hampshire, but that no assets have come into his hands by virtue of his appointment as such receiver; and that he is informed and believes that there are no assets of the corporation in that State.

The report of the Chief Justice of the Superior Court to this court finds that it has been decided by a single justice of the Supreme Court of the State of New Hampshire, in a case pending before that court, to which, as we understand, the present defendant society was not a party, that corporations similar to the defendant society are fraudulent and illegal under the laws of that State, and that the rule there laid down is that the funds in the hands of the receiver should be distributed *pro rata* to the persons who have contributed to the funds, "without regard to the fact whether they have paid all the so called assessments levied upon them or not." This is a different rule from that laid down by the Superior Court* in this case, which gives effect to the constitution and by-laws of the society, under which the rights of many holders of certificates are held to have lapsed by reason of the nonpayment of assessments, or in some other manner. The Superior Court adopted substantially the same rule as that declared in *Fogg v. United Order of the Golden Lion*, 156 Mass. 431.

The receiver finds that this society has not complied with the provisions of St. 1888, c. 429, § 13. We doubt whether the organization under the statutes of New Hampshire which is shown by the agreement of the six persons hereinbefore referred

* By the third paragraph of the decree of the Superior Court it was provided that, under the constitution and by-laws of the Order, all certificate holders who, on November 16, 1891, the date of the filing of the bill asking for the appointment of a receiver, had failed to pay any assessment to and including assessment number 21, which was the last assessment levied by the corporation, for thirty days after the same was called, and had not been reinstated under the by-laws, must be deemed to have retired of their own motion before the court intervened, and be treated as no longer members in good standing, and held to have no interest in the fund to be distributed.

to can be called a fraternal beneficiary corporation, within the meaning of St. 1888, § 429. An examination of the General Laws of New Hampshire, c. 152, renders it very doubtful whether any corporation was legally established under the laws of that State. If it be a corporation at all, it purports by the agreement to be a corporation for doing, among other things, the business of a general broker in stocks, securities, etc., and this is not the business of a fraternal beneficiary corporation. If it be a foreign corporation, we do not see why it is not within the provisions of St. 1890, c. 321. If it be no corporation, then the members of the society must be regarded as a voluntary association of individuals, and all the members of the society and of the subordinate lodges seem to have assented to the constitution and by-laws adopted by the Supreme Lodge. The maturity and reserve funds, we think, are to be regarded as funds held by the Supreme Lodge on a sort of trust for the holders of certificates. *Coe v. Washington Mills*, 149 Mass. 543.

In the decree entered by the Superior Court the receiver was instructed in the second paragraph as follows: "That claims of certificate holders and creditors from other States must be postponed until the claims of citizens of this Commonwealth have been paid in full; and that the fact that certain foreign certificate holders have sued and obtained judgment in a court of this Commonwealth does not entitle them to the rights of citizens of this Commonwealth in a distribution of this fund." Certain holders of certificates resident in the State of Rhode Island have appealed from this decree, and especially from the second paragraph. Some of them have attached property in Rhode Island or in Massachusetts belonging to the society, and some of these have obtained judgments; others of the appellants are holders of certificates and members of Bristol Lodge No. 10, of Bristol, Rhode Island, who, as we understand, have not brought suits or attached the property of the society anywhere, and who have presented their claims for proof before the receiver appointed here. If the society is within the provisions of St. 1890, c. 321, § 2, it could have gone into insolvency under our laws, and by the terms of the second section of this statute the assignees would have had the rights, powers, duties, and privileges that assignees of Massachusetts corporations have, "so far as any

property rights or credits within the Commonwealth, or which may be put into their possession by said corporation, are concerned." This section also provides that it shall be the duty of such assignees "so far as practicable to distribute such assets in such a manner that all creditors of the insolvent corporation, whether within this State or elsewhere, shall receive proportionate dividends out of the assets of said corporation, whether the same are within the control of said assignees or not."

It is plain that the bringing of this bill and the appointment of a receiver did not dissolve attachments of the property of the society theretofore made, whether in this Commonwealth or elsewhere, if the attachments were valid, upon which we express no opinion. *Hubbard v. Hamilton Bank*, 7 Met. 340. *Taylor v. Columbian Ins. Co.* 14 Allen, 353. *Folger v. Columbian Ins. Co.* 99 Mass. 267. *Kittredge v. Osgood*, post, 384. See *Burdon v. Massachusetts Safety Fund Association*, 147 Mass. 360.

We do not deem it necessary to consider the general powers and duties in this Commonwealth of receivers of corporations appointed by the courts of other States which created the corporations, or of ancillary receivers appointed by the courts here. If this society be a corporation, it does not appear to have any assets in the State of New Hampshire, or any place of business there, or any officers resident there. The only place of business of the society appears to have been in this Commonwealth, and all of its officers, and, so far as we know, all of its members, although not all of the members of subordinate lodges, were inhabitants of this Commonwealth. It is not contended by any of the appellants that the receiver appointed by the Superior Court here has not authority to receive and distribute all the assets of the society found within the Commonwealth, and if an assignment of the property of the society found outside of the Commonwealth has been made by the society to the receiver pursuant to the order of the court, then he stands in the position of an assignee of such property. How far the courts of other States will recognize his rights within those States, it is not for us to decide. Some property has been transmitted from persons and lodges in other States to the receiver here, and is now held by him. All the property held by him with perhaps the exception of certain articles of furniture, and certain small amounts

of money, if any can be identified as belonging to the general fund, was, as we understand, under the constitution and by-laws, the property of the Supreme Lodge, which held it for the benefit of all holders of certificates, no matter to what subordinate lodges the holders belonged. It seems to us that the Superior Court rightly considered that the society, whether it be regarded as a corporation or an unincorporated association, had its actual home in this Commonwealth, and that its funds held for the benefit of holders of certificates should be distributed here so far as the court has power to do this, and that it is equitable and more nearly according to the analogy of the provisions of St. 1890, c. 321, that, so far as is practicable, the moneys belonging to the benefit and reserve funds in the hands of the receiver should be proportionately distributed among the holders of certificates without regard to the place of residence of such holders. If any of such holders have property of the society in their possession, or have attached property in this or other jurisdictions, or have proved claims against property of the society in other jurisdictions, we are of opinion that it is not practicable, with a view to equality, that they should be admitted to prove their claims against the property in the hands of the receiver here unless they account for the property in their possession, or discharge such attachments, or cancel such proofs, or unless the property which they have attached or against which they have made proof of claims is put into the hands of the receiver here for equitable distribution. If the property attached is put into the hands of the receiver here, and the attachment was valid, the question whether the attaching certificate holder's claim is to be preferred to the extent of the amount of the property attached is not before us in this case. See, however, *Kittredge v. Osgood*, *post*, 384. If the society is regarded not as a corporation, but as a voluntary association of individuals doing business in this Commonwealth under a constitution and by-laws to which all the members have assented, the members of the association must be regarded either as partners or co-owners of the property. *Ricker v. American Loan & Trust Co.* 140 Mass. 346. *Gott v. Dinsmore*, 111 Mass. 45.

We know of no better rule for determining who the members

of this association or of the subordinate lodges were at the time the bill was filed, than to determine this according to the constitution and by-laws governing the Supreme Lodge and the subordinate lodges. *Danbury Cornet Band v. Bean*, 54 N. H. 524. *Lafond v. Deems*, 81 N. Y. 507. If the association is not strictly a partnership, the property on the dissolution must be distributed among the members in much the same manner as if it were a partnership. See *Gorman v. Russell*, 14 Cal. 531.

Considering the nature of the whole organization, whether the Supreme Lodge and the subordinate lodges be regarded as one association or as different associations, or the Supreme Lodge be regarded as a corporation with the power to constitute subordinate lodges, we think that the court rightly gave effect to the constitution and by-laws as binding on the members, and that there is no more equitable rule for determining who the members were when the bill was filed than the one adopted by the Superior Court after the analogy of the decision in *Fogg v. United Order of the Golden Lion*, *ubi supra*. See *Buswell v. Order of the Iron Hall*, *ante*, 224.

The second paragraph of the decree should be modified in accordance with this opinion, and the Superior Court should proceed in accordance therewith.

So ordered.

B. B. Johnson, (*W. C. Parker* with him,) for certain certificate holders.

O. L. Bosworth, for other certificate holders, was permitted to file a brief.

G. W. Anderson, for the receiver.

WILLIAM H. PETTINGELL vs. CITY OF CHELSEA.

Suffolk. January 10, 1894. — May 18, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Liability of Municipal Corporation.

A city is not liable, at common law or under St. 1887, c. 270, to a person in its employ who, in the exercise of due care, is injured by the breaking of a pole to which were attached the wires of the fire signal system of the city, although the pole broke because it was "negligently constructed, cared for, maintained, and placed" in its position.

TORT, for injuries sustained by the plaintiff while in the employ of the defendant. The declaration alleged that, on June 25, 1891, the plaintiff was employed by the defendant as a lineman upon a fire signal system established by it; that on that day while in the exercise of due care and under the direction and order of the defendant, its servants and agents, and in the course of his employment, he ascended a pole to which were attached the wires of the signal system; and that the pole was by the defendant, its servants and agents, so negligently constructed, cared for, maintained, and placed in the position it occupied, that it broke while the plaintiff, without knowledge of its condition, was upon it, and fell to the ground, carrying him with it, and injuring him.

There was also a count under St. 1887, c. 270. The defendant demurred, on the ground that the declaration set forth no legal cause of action.

The Superior Court sustained the demurrer, and directed judgment for the defendant; and the plaintiff appealed to this court.

M. T. Allen, for the plaintiff.

D. E. Gould, for the defendant.

FIELD, C. J. This is an appeal from an order of the Superior Court sustaining a demurrer to the plaintiff's declaration and directing judgment for the defendant. The declaration contains two counts, the first at common law and the second under St. 1887, c. 270. The demurrer is general, but the point is not

taken that the second count contains no allegation that notice of the time, place, and cause of injury was given to the defendant.

We assume that St. 1887, c. 270, may apply to cities and towns. See *Connolly v. Waltham*, 156 Mass. 368; *Conroy v. Clinton*, 158 Mass. 318. But the statute in terms only gives to an employee who has received personal injury from the causes described in the first three clauses of the first section, or to his legal representatives in case the injury results in death, "the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work."

The question then is whether a city is responsible in damages to any person who, in the exercise of due care, is injured by the breaking of a pole to which were attached the wires of the fire signal system of the city, if the pole broke because it was "negligently constructed, cared for, maintained, and placed" in its position. The special authority of the city of Chelsea to establish a fire department is found in St. 1881, c. 200, § 16.

In *Hafford v. New Bedford*, 16 Gray, 297, it was held that the city was not liable for the negligence of the members of a fire department established by the city council pursuant to an act of the Legislature. In that case the alleged negligence consisted in the members of the fire department carelessly driving a hose carriage against the plaintiff in a public highway during an alarm of fire.

In *Fisher v. Boston*, 104 Mass. 87, the plaintiff was injured by the bursting of hose connected with a fire engine, which was alleged to have been defective and to have been negligently used at a fire by members of the fire department. It was held that the city was not liable. In the opinion it is said: "In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or a public way." See *Tainter v. Worcester*, 123 Mass. 311.

The present case, we think, comes within the general doctrine declared in *Hill v. Boston*, 122 Mass. 344, viz.: "That no private action, unless authorized by express statute, can be maintained

against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage."

Judgment affirmed.

CHARLES F. WHEELER vs. JOSEPH W. HANSON.

Suffolk. January 12, 1894. — May 18, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Malicious Prosecution — Evidence — Damages — Practice.

In an action for malicious prosecution on a criminal charge, the plaintiff may show that in the record of "No bills" returned by the grand jury to whom the alleged criminal charge against him was presented, the substitution of the letter P for the letter F as the initial of his middle name was a clerical error, and that he was the person meant.

In an action for malicious prosecution on a criminal charge, evidence as to what the plaintiff paid sureties to go upon the bond required of him for his appearance in the Superior Court, and what he paid for counsel fees, was properly admitted, as was also the evidence as to the nature of the plaintiff's employment, and the tools required in it, the difficulty which after his discharge he had in obtaining employment, the amount of his earnings before and after the criminal prosecution, the injury to his feelings and reputation, and the indignity which he suffered.

In an action for malicious prosecution on a charge of embezzlement of goods from the defendant's store, evidence that land was taken by the plaintiff from a purchaser in payment for the goods at a price greatly above its real value would have no tendency to show that the defendant had probable cause for believing that the plaintiff had embezzled the goods, and is not admissible in mitigation of damages.

In an action for malicious prosecution evidence as to damages after the date of the writ is admissible.

In an action for malicious prosecution on a criminal charge, it is not proper for the defendant to argue to the jury as to the effect of the plaintiff's motion to dismiss the complaint against him in the Municipal Court.

TORT, for the malicious prosecution against the plaintiff of a charge of embezzlement. Writ dated April 18, 1892.

Trial in the Superior Court, before Bond, J., who allowed a bill of exceptions, in substance as follows.

One Ingalls, clerk of the Municipal Court of the City of Boston for the transaction of criminal business, against the objection of the defendant, read the complaint charging the plaintiff with

embezzlement, and the docket entries of that court in relation thereto, and testified that, according to the usual practice in that court, he caused an attested copy of the complaint to be made, and transmitted to the clerk of the Superior Court for criminal business. In that copy of the complaint, however, the defendant was described as Charles P. Wheeler instead of Charles F. Wheeler.

The assistant clerk of the Superior Court for the County of Suffolk for the transaction of criminal business, against the objection of the defendant, read the record of that court for the March term, 1892, which was as follows.

“Saturday, March 12, 1892.

“In the following cases the grand jurors attending said court having returned no bills, the court doth order that the prisoners be severally discharged and go without day :

.
.

Commonwealth v. Charles P. Wheeler, embezzlement.”

He also testified that neither the name of Charles F. Wheeler nor Charles P. Wheeler appeared on the record among those against whom the grand jury found indictments at the March term, 1892. It did not appear from the record that the grand jury found no bill against Charles F. Wheeler at the March term, and no record or other evidence was introduced to show any action by the grand jury at any other term relating to any criminal proceeding against the plaintiff.

The plaintiff testified that he was in court when the grand jury reported for the March term; and that he heard the announcement of “No bill” found against Charles P. Wheeler, and that thereupon he was discharged and permitted to go without day by the court upon the complaint for the alleged embezzlement, and the defendant admitted that, with other witnesses, he testified before the grand jury with reference to the alleged embezzlement substantially as he had testified in the Municipal Court under the complaint against Charles F. Wheeler.

The plaintiff testified that he was a watchmaker by trade; that in April, 1891, he entered into an agreement to work for the defendant in a jewelry store on Tremont Street in Boston

owned by him, and continued in the defendant's employ until January 21, 1892, when he and the defendant entered into a new agreement, by which the plaintiff, in lieu of wages, was to receive all that he received for the sale of goods in excess of the prices at which they were entered in duplicate in two books, each containing a duplicate of the agreement, one of which was to be retained by each party; that the defendant was not at the store much of the time, but was desirous of selling it, and at about that time had advertised it for sale, and had informed the plaintiff that, if he would find a purchaser therefor for the price of one thousand dollars, he would pay him a commission, and that he might sell the store in his own name; that the plaintiff effected a sale of the store at that price to one Smith, in exchange for a tract of land in the town of Millis, with the understanding that Smith might have a reconveyance of the land by the payment of one thousand dollars within thirty days thereafter; that during the negotiations the defendant was notified thereof, and assented to the exchange, and authorized the plaintiff to take a deed of the land in his own name, and subsequently ratified the same; that the defendant having given his consent to a bill of sale from the plaintiff to Smith, the plaintiff, on February 5, 1892, executed in his own name and delivered to Smith the bill of sale, and Smith executed and delivered to the plaintiff a deed of the land in Millis, the consideration in each deed being stated as "one dollar and other valuable considerations"; that at the same time the plaintiff executed and delivered to Smith an agreement by which the latter acquired an option to demand a reconveyance of the land upon payment within thirty days of one thousand dollars; that the plaintiff immediately sent the deed to Dedham to be recorded; and that thereupon he and Smith went, with one Dixon, a broker through whom the sale had been negotiated, to the store, and the plaintiff delivered possession of it to Smith and Dixon, and the latter, at Smith's request, fastened the door of the store with a padlock "to keep the other man out," it having previously been stated by the plaintiff to Dixon and Smith that "there was another party interested whose consent must be obtained," though the name of the defendant, to whom reference was made, was not mentioned. The plaintiff had removed no goods from the store, but he had

compared them with the schedule, and had found that they were all there at the time of the delivery of the bill of sale.

The complaint against the plaintiff was made on February 12, 1892, and he was arrested on the same day, and his premises were searched by virtue of a search-warrant, and the book of the defendant was found there, which the plaintiff testified he had taken home for the purpose of safe keeping at the time of the delivery of possession to Smith, as well as certain articles of jewelry which the plaintiff, with the defendant's consent, reserved from the store to offset the value of some tools belonging to him which were included in the bill of sale.

When the plaintiff was arrested he was committed to jail, and on February 18, 1892, he filed a motion to dismiss the complaint, which was overruled, and upon the hearing he was ordered to recognize in the sum of \$800, with sureties, to appear and answer at the next March term of the Superior Court for criminal business, and, failing so to recognize, was again committed to jail, where he remained a week, and until he recognized.

The plaintiff, against the objection and exception of the defendant, was allowed to show that he paid \$50 to the sureties who went upon his recognizance, and the same sum for counsel fees in the defence of the complaint against him in the Municipal Court. He further testified, against the objection and exception of the defendant, that after the hearing he endeavored to procure employment, and made application at the store of one Percival to purchase tools on credit, which application was refused by the salesman to whom it was made because he had heard that the plaintiff "had been in jail on account of that jewelry store on Tremont Street"; that he made a similar application at the store of one Myers, and was refused, and was asked whether "he was the man that was arrested"; that, by reason of the taking from him on the search-warrant of the goods which he had reserved, he was unable to procure tools, and without them he could not obtain employment; that prior to January 21, 1892, he had been earning from \$18 to \$20 per week, and that after his arrest, with the exception of small irregular jobs, it was more than five months before he obtained employment, and that he then, after this action was brought, secured employment by which he was able to earn from \$12 to \$16.50 per week.

Smith was called as a witness by the plaintiff, and gave substantially the same testimony as to their transaction as the plaintiff, and on cross examination, having stated that he had never seen the land which he conveyed to the plaintiff, was asked how much he paid for it. The judge excluded the question, and the defendant excepted.

The plaintiff introduced further evidence tending to show that the criminal prosecution was malicious, and without probable cause.

The defendant testified in his own behalf, and also called as a witness one Snow, who was an assessor of the town of Medway, and offered to show by him that the land taken by the plaintiff was swamp land, and of little or no value. The evidence was excluded, and the defendant excepted.

This was all the material evidence in the case.

The defendant's attorney, in his closing argument, proceeded to argue that the fact that the plaintiff had filed a motion to dismiss the complaint in the Municipal Court, tended to show an unwillingness on his part to meet the charge contained in the complaint on its merits, but the judge refused to permit him to argue upon that point; and the defendant excepted.

Appropriate instructions were given to the jury, to which no exception was taken, except as to that portion relating to the right of the jury to determine whether the criminal prosecution had been terminated before the commencement of this action.

On this point the judge instructed the jury as follows:

"The complaint that was introduced here as signed by this defendant was against Charles F. Wheeler, but the record of the proceedings before the grand jury shows that the matter acted upon by it, and upon which 'No bill' was reported, named the defendant as Charles P. Wheeler. Now is that the same person as was designated in the complaint which was signed by the defendant. . . . The initial letter of the middle name was F in the original complaint, which is the real name of this plaintiff; but when it comes to this court, the paper that is relied upon as the one that shows the termination of these proceedings is against Charles P. Wheeler. . . . You may take into consideration the fact that the two complaints were signed by

the same person by the name of the defendant; that the goods described in the original complaint as having been embezzled were precisely the same goods which were described in the complaint upon which the grand jury acted, and that the entire description of the property which was taken, and of the offence which was said to have been committed, is the same as that charged in the original complaint. You may also take into account that there was no other complaint, so far as that has been proven by the records, against any Charles F. Wheeler; that there was no complaint upon which the grand jury returned 'No bill' against Charles F. Wheeler; that there was no indictment returned against any Charles F. Wheeler; that the number of the case in the Municipal Court was the same as the one upon which the grand jury acted, and upon which the plaintiff relies here as being the same, showing that it really is the same case. Take all of these circumstances into account, and say whether it is the same case, the same charge against the same man, although there was a different description of his middle name — the initial letter — in the one that the grand jury had from the one that was signed by the defendant. If it was the same complaint, and the grand jury reported 'No bill' upon it, that is a termination of this complaint, so that the party is then entitled to bring his suit."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. H. Tyng, for the defendant.

J. K. Berry, (*E. R. Anderson* & *E. C. Upton* with him,) for the plaintiff.

MORTON, J. The first objection by the defendant to the admission of evidence did not result in an exception, and need not, therefore, be considered.

We discover no error in regard to the admission of evidence to show that the prosecution had terminated. The substitution of the letter P for the letter F as the initial of the plaintiff's middle name was wholly a clerical mistake, and the plaintiff was properly allowed to show that fact and that he was the person meant. *Wood v. Le Baron*, 8 Cush. 471. In an action against the plaintiff's sureties on his recognizance, it could have been shown that the mistake in his name was a purely clerical

error. *Wood v. Le Baron*, *ubi supra*. The principle that a record cannot be impeached or contradicted has no application to a case like the present, where it is evident from one part of the proceedings that a clerical mistake has occurred in another part of the proceedings. *Eastman v. Perkins*, 10 Cush. 249. *Commonwealth v. McMahon*, 133 Mass. 394. *Commonwealth v. Brigham*, 147 Mass. 414, 416.

The evidence as to what the plaintiff paid the sureties to go upon his bond, and what he paid for counsel fees, was properly admitted. If it was objected to on the ground that there was no allegation of special damage in the declaration, that objection should have been called to the attention of the court at the trial, and was not.

The expenses to which the plaintiff was put in procuring sureties and in employing counsel were the direct and necessary result of the defendant's act, and constituted a part of the damages to which the plaintiff was subjected in consequence thereof. *Savile v. Roberts*, 1 Ld. Raym. 374. *Foxall v. Barnett*, 2 El. & Bl. 928. *Sheldon v. Carpenter*, 4 Comst. 578. *Marsshall v. Betner*, 17 Ala. 832. *Lawrence v. Hagerman*, 56 Ill. 68, 75. *Magner v. Renk*, 65 Wis. 364. *Walker v. Pittman*, 108 Ind. 341. *Blunk v. Atchison, Topeka, & Santa Fe Railroad*, 38 Fed. Rep. 311, 317. 2 Greenl. Ev. § 456. It has been held more than once in this State, that when the plaintiff has, in consequence of the wrongful conduct of the defendant, been put to expense in the employment of counsel, the amount so paid is an element of damage in an action against the defendant arising out of such wrongful conduct. *Pond v. Harris*, 113 Mass. 114, 121. *New Haven & Northampton Co. v. Hayden*, 117 Mass. 433. *Westfield v. Mayo*, 122 Mass. 100. *Faneuil Hall Ins. Co. v. Liverpool, London, & Globe Ins. Co.* 153 Mass. 63, 72. See also *Boston & Albany Railroad v. Charlton*, *ante*, 32, and *Conant v. Burnham*, 133 Mass. 503, 505.

We also think that it was competent for the plaintiff to show the nature of his business and the tools required in it, the difficulty which he had in getting employment, the trouble to which he was subjected by taking away the property on which he relied to obtain other tools, the amount of his earnings, the injury to his feelings and reputation, and the indignity which

he suffered. *Hunter v. Farren*, 127 Mass. 481. *Morgan v. Curley*, 142 Mass. 107. *French v. Connecticut River Lumber Co.* 145 Mass. 261. *Leach v. Wilbur*, 9 Allen, 212. *Tompson v. Mussey*, 3 Greenl. 305. *Ehrgott v. Mayor, &c. of New York*, 96 N. Y. 264. *Sedgwick, Damages*, (8th ed.) § 133.

The natural and necessary results of the charge which the defendant made against the plaintiff, and of his action thereon, would be, as they became known, to render it more difficult for him to obtain employment, and to impair his credit and to affect his reputation, besides injuring his feelings and subjecting him to indignity.

The prosecution instituted by the defendant against the plaintiff was for the embezzlement of goods from the store. Evidence that the land taken by the plaintiff in exchange for the store was taken at a price greatly above its real value would have no tendency to show that the defendant had probable cause for believing that the plaintiff had embezzled the goods, and was not admissible in mitigation of damages. *Bliss v. Franklin*, 13 Allen, 244. It was therefore properly excluded.

There can be but one assessment of damages for the cause of action on which this suit is based, and all the damages, those accruing after as well as before the bringing of the action, must be included in it. Evidence as to damages after the date of the writ was therefore rightly admitted. *Fay v. Guynon*, 131 Mass. 31. The case is not like that of a continuing trespass, for instance, where new causes of action arise from day to day, or a case in which there may be successive breaches of the same contract.

The court properly refused to allow the defendant to argue to the jury as to the effect of the motion to dismiss, filed by the plaintiff in the Municipal Court. The plaintiff had a right to make the motion, and it cannot be considered in any sense as an admission of guilt on his part, or as showing that the defendant had probable cause to believe him guilty.

The result is, that the exceptions must be overruled, and it is
So ordered.

THOMAS J. WATTS vs. BOSTON TOW-BOAT COMPANY.

Suffolk. January 12, 1894. — May 18, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Personal Injuries — Due Care.

The plaintiff, who was employed by the defendant on a steam tug which was engaged by daylight in towing a barge, while looking out for the bow line of the tug was ordered by the captain to look out for the stern line. In responding in haste to the order he stepped with one foot on the iron cover or grating of a lazarette or round hole in the deck where he had to stand to reach the stern line, and the cover or grating slipped partially off and tipped, letting one of his feet into the hole and injuring him. The plaintiff testified that in the course of his duty he was obliged to look out for the stern line more than once a day; that he knew that the cover or grating, on account of accumulated rust and wear, would slip, but that he had never before known it to tip; that it was his duty to take off and put on the cover of the lazarette, and that he had frequently done so, sometimes several times a day, for a period of eight months previous to the accident; and that during that time the cover had been in the same condition, ordinary wear and tear excepted, and that he was aware of its condition, but of this there was no evidence that he had ever made complaint to any one. *Held*, that the plaintiff was not in the exercise of due care, and that he was not entitled to recover.

TORT, for injuries received while in the employ of the defendant, by falling into a hole in the deck of a steam tug owned by the defendant.

Trial in the Superior Court, before *Thompson, J.*, who allowed a bill of exceptions, in substance as follows.

On November 18, 1891, at about eleven o'clock in the forenoon, the tug *Argus*, on which the plaintiff was employed, was towing a barge up the Mystic River, and just after the two had passed through a drawbridge and the tow lines which had been thrown off for that purpose had again been taken up by the tug, the force of the tide running between it and the barge caused a strain upon the connecting lines, and the stern line began to render or slip on the bits of the tug, around which it was secured. The captain thereupon cried out, "What's the matter with that stern line? Look out for that stern line!" The plaintiff, who was looking out for the bow line, rushed to the stern to make another turn of the stern line around the bits. As he did so, he

I stepped with one foot on the iron cover of a lazarette, so called, being a round hole in the deck where he had to stand to reach the stern line. The cover of the hole slipped partially off the opening and tipped, letting one of his feet into the hole, and thereby causing his injuries. The lazarette measured about eighteen inches on the inside, and was surrounded by an iron rim. It was provided with an iron grating which set down into the opening on a level with the deck, and with an iron cover which set over the rim of the lazarette about an inch above the deck.

The plaintiff testified, on cross-examination, that he was so dazed by his injuries that he was unable to state positively whether it was the iron cover or the grating upon which he stepped. The plaintiff also stated that he knew, prior to the accident, that the iron cover, on account of accumulated rust and wear, would slip, but never knew it to tip before.

He also testified that it was part of his duty to take the cover off and put it on, and that he did so very frequently, almost every day and sometimes several times a day, for eight months just previous to the accident; that before this period of eight months he had worked on the Argus at different times; that both the cover and the grating had been in exactly the same condition, except the ordinary wear and tear, all the time; and that he was fully aware of their condition. There was no evidence that the plaintiff had ever complained to any one of the condition of the lazarette's cover or grating. He testified further, that in the course of his duty he was obliged to look out for the stern line more than once a day.

One Hafey, the cook on board the tug, testified that immediately after the accident he ran to pick up the plaintiff and found him lying alongside the lazarette bleeding from a wound, and that the iron cover of the lazarette was at that time resting on the roof of the deck-house, a few feet away, and that the iron grating was lying beside the plaintiff near the lazarette to which it belonged. He also testified that the grating was rusted and worn smooth from age, and had a piece broken out of it, and that he never knew it to tip before although he had heard of others tipping.

This was all the material evidence introduced by the plaintiff.

The defendant introduced evidence on points not necessary to be stated, but offered no testimony touching the accident.

At the conclusion of the evidence the defendant requested the judge to rule that the action could not be maintained. The judge ruled as requested, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

F. P. Curran, (*M. B. Coogan* with him,) for the plaintiff.

J. Lowell, Jr., (*S. H. Smith* with him,) for the defendant.

FIELD, C. J. The exceptions recite as follows: "He [the plaintiff] also testified that it was part of his duty to take the cover off and put it on, and that he did so very frequently, almost every day and sometimes several times a day, for eight months just previous to the accident; that before this period of eight months he had worked on the *Argus* at different times; that both the cover and the grating had been in exactly the same condition, except the ordinary wear and tear, all the time; and that he was fully aware of their condition. There was no evidence that the plaintiff had ever complained to any one of the condition of the lazarette's cover or grating. He testified further, that in the course of his duty he was obliged to look out for the stern line more than once a day." "The plaintiff also stated that he knew, prior to the accident, that the iron cover, on account of accumulated rust and wear, would slip, but never knew it to tip before."

It is not absolutely certain whether the plaintiff stepped upon the grating or the cover, but it is probable that he stepped upon the grating, which tipped and let one of his feet into the hole. According to his own testimony, the plaintiff knew as well as anybody, perhaps better than anybody else, the defects, if there were any, in the grating and the cover, and the danger of stepping upon the grating or the cover when either was placed over the hole. The plaintiff was required to look after the stern line, and it was necessary for him to do this in a hurry; but he was permitted to do it in his own way, and it was daylight at the time. Upon the testimony of the plaintiff himself, we think it appears that he was wanting in due care. See *Lothrop v. Fitchburg Railroad*, 150 Mass. 423.

Exceptions overruled.

WILLARD F. BARNES vs. ALICE L. BARNES.

Suffolk. January 23, 1894. — May 18, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Delivery of Deed — Cloud on Title.

On a bill in equity filed for the cancellation of a deed, it appeared that the plaintiff signed and sealed a deed purporting to convey a parcel of land to the defendant, and caused it to be recorded. He then received it back, but did not hold it as the agent or guardian of the defendant or on his behalf. It never was in the possession of the defendant or of any one representing him, and the plaintiff, on request, refused to surrender it. Before such request, but after he had received it back from the registry, he communicated its existence to the defendant, and spoke to him of the land described in it as his, as he then supposed it was. The defendant assented to the transaction so far as he could when told of it. When the plaintiff had the deed recorded, he meant to pass the title to the defendant, and supposed he was doing so, but throughout he kept possession of the land. *Held*, that the deed was never delivered, or became operative, and that the plaintiff was entitled to a decree.

BILL IN EQUITY, filed November 25, 1892, for the cancellation of a deed alleged not to have been delivered to the defendant, and constituting an alleged cloud on the title of the plaintiff.

Hearing before *Holmes, J.*, who entered a decree for the plaintiff, and, at the request of the defendant, reported the case for the consideration of the full court, in substance as follows.

The plaintiff, on June 2, 1883, signed and sealed a deed purporting to convey a parcel of land in Boston to the defendant, and caused it to be recorded. He then received it back, and it never was in the possession of the defendant or of any one representing her. The plaintiff never held the deed as the agent or guardian of the defendant or on her behalf, and, when requested by her counsel to surrender the deed, refused so to do. Before such request, but long after he had received the deed back from the registry, he communicated the existence of the deed to the defendant, and spoke to her of the land described in it as hers, as he then supposed it was. The defendant assented so far as she could to the transaction when

it was communicated to her. When the plaintiff had the deed recorded he meant to pass the title to the defendant, and supposed that he was doing so. Throughout the transaction he kept possession of the land.

J. Prentiss & O. R. Mitchell, for the defendant.

1. The effect of a manual delivery is in all cases a question of the intent with which the act is done.

(a) If there is no intent, no act can amount to a delivery. *Maynard v. Maynard*, 10 Mass. 456. *Mills v. Gore*, 20 Pick. 28. *Hawkes v. Pike*, 105 Mass. 560. *Wall v. Hickey*, 112 Mass. 171. *Shurtleff v. Francis*, 118 Mass. 154. *Hale v. Joslin*, 134 Mass. 310. *Johnson v. Baker*, 4 B. & A. 440. *Gudgen v. Besset*, 6 El. & Bl. 986. *Parker v. Dustin*, 22 N. H. 424. *Taft v. Taft*, 59 Mich. 185.

(b) If there is an intent and an act, the title passes presently. *Shaw v. Hayward*, 7 Cush. 170. *Garmons v. Knight*, 5 B. & C. 671. *Church v. Gilman*, 15 Wend. 656. *Commercial Bank v. Reckless*, 1 Halst. Ch. 430. *Blight v. Schenck*, 10 Penn. St. 285. *Alexander v. Alexander*, 16 Reporter, 329. *Moore v. Giles*, 49 Conn. 570. *Glaze v. Three Rivers Farmers' Ins. Co.* 87 Mich. 349.

In those jurisdictions where assent of the grantee to receive the benefit offered to him is held to be requisite, a delivery to a third person with intent to pass title has been held good in the following cases.

The grantee having assented before execution; *Hedge v. Drew*, 12 Pick. 141; *Church v. Gilman*, 15 Wend. 656; or where the grantee knew of the delivery; *Wheelwright v. Wheelwright*, 2 Mass. 447; *Hall v. Harris*, 5 Ired. Eq. 303; or where the grantee subsequently assented; *Harrison v. Phillips Academy*, 12 Mass. 456, 461; *Marsh v. Austin*, 1 Allen, 235; *Cowell v. Daggett*, 97 Mass. 434.

There is no distinction to be drawn between delivery to a register of deeds in its operation upon the title, the other requisites being present, and delivery to any other third person. *Hedge v. Drew*, 12 Pick. 141. *Mitchell v. Ryan*, 3 Ohio St. 377.

2. If there is an intent and words to indicate it, the actual performance of any particular act is unnecessary. *Moore v. Hazelton*, 9 Allen, 102. *Regan v. Howe*, 121 Mass. 424. *Snow*

v. Orleans, 126 Mass. 453. *Garmons v. Knight*, 5 B. & C. 671. *Exton v. Scott*, 6 Sim. 31. *Lloyd v. Bennett*, 8 C. & P. 124. *Xenos v. Wickham*, L. R. 2 H. L. 296. *Jones v. Swayze*, 13 Vroom, 279. *Ruckman v. Ruckman*, 5 Stew. 259. *Toms v. Owen*, 52 Fed. Rep. 417. *Scrugham v. Wood*, 15 Wend. 545.

Where a delivery of a deed to a register of deeds with intent to pass title is found as a fact in the lower court, the question whether there has been a valid delivery is not open in an appellate court. *Hedge v. Drew*, 12 Pick. 141. *Moore v. Giles*, 49 Conn. 570. *Alexander v. Alexander*, 16 Reporter, 329. *Glaze v. Three Rivers Farmers' Ins. Co.* 87 Mich. 349.

E. H. Savary, for the plaintiff.

MORTON, J. It is expressly found in the report that the plaintiff never held the deed as the agent or guardian of the defendant, or on her behalf, and that it never has been in her possession or in that of any one representing her. The plaintiff has always kept possession of the land, and has always had actual possession of the deed, except when it was at the registry. There is no finding that, when he carried the deed to be recorded, he delivered it to the register as the agent of or on behalf of the defendant, or for her use, or to be transmitted to her. It is not found what the consideration was, nor that there was any. When the plaintiff had the deed recorded, he meant to pass the title to the defendant, and supposed that he had done so, but he did no act except to make and execute the deed, and cause it to be recorded. Long after he had received it back he communicated its existence to the defendant, and spoke of the land as hers, as he supposed it was, but he did not then, or at any time, say that he was holding the deed for her, or would give it to her. She assented to the transaction, so far as she could, when told of it.

It is well settled in this State that the leaving of a deed by the grantor with the register for record, and the recording of it by the register, do not constitute a delivery. *Maynard v. Maynard*, 10 Mass. 456. *Samson v. Thornton*, 3 Met. 275. *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228, 231. *Hawkes v. Pike*, 105 Mass. 560. *Commonwealth v. Cutler*, 153 Mass. 252. *Parrott v. Avery*, 159 Mass. 594. All that this case adds is the unexpressed intention on the part of the grantor when he had

the deed recorded, to pass the title to the defendant. In order to render that intention effectual he should have manifested by some act or declaration his purpose that what took place should be regarded as a delivery to or for the grantee. Otherwise one might convey land by executing and recording a deed with intent to pass the title without any delivery of the deed by which the transfer is effected. If the question were a new one there would perhaps be nothing difficult or impracticable in the conception that the act of leaving a deed with the register for record by the grantor with the intent on his part thereby to vest the title in the grantee should constitute the register the agent for delivery of the grantee, and that upon the assent of the grantee the transaction should take effect as a valid delivery. But we think the law is otherwise in this State, and that the ruling of the presiding justice was correct, and that the plaintiff is entitled to a decree.

Decree accordingly.

**CHARLES F. KITTREDGE, receiver, vs. MARIE L. OSGOOD
& others.**

Suffolk. January 24, 1894. — May 18, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Beneficiary Association — Attachment — Appointment of Receiver.

An attachment of the property of a corporation, if valid when made, is not discharged by the subsequent filing of a bill and the appointment of a receiver of the corporation; and if the funds attached have been paid over to the receiver by the order of the court without prejudice to the rights of the attaching parties, the receiver takes the property subject to all valid attachments.

The appointment of a receiver is not a bar to suits brought against a corporation before the bill is filed, nor do such suits abate in consequence of such appointment, but the receiver may appear in and defend the suits if the interests which he represents render it proper or necessary.

APPLICATION, filed October 17, 1893, by the receiver of the Supreme Lodge Knights and Ladies of Protection, alleging that on February 24, 1892, when he was appointed receiver on a bill filed by John S. Page and another, certain actions at law brought

by Marie L. Osgood and others against the corporation were pending ; that the plaintiffs in those actions, the defendants in this application, declined to present their claims to him for settlement, or to present them for the determination of the court, but proposed to proceed to judgment on the actions, and claimed the right to satisfy such judgments in full out of funds attached by them, and asking for an order of notice on the defendants to show cause why they should not be enjoined from proceeding to judgment on the actions, and why the funds in the hands of the receiver should not be distributed free of the attachments made by them.

At the hearing in the Superior Court, before *Hammond, J.*, it appeared that the defendants became members of the Supreme Lodge Knights and Ladies of Protection, a corporation organized under the provisions of St. 1888, c. 429, received certificates of membership therein, and paid their assessments ; that while such members they each became sick and disabled, and having complied with all the requirements of the Order as to notification, proof, etc. of such sickness, they became entitled to receive sick benefits ; that their claims were allowed by the subordinate lodges, and forwarded to the Supreme Lodge for payment ; that the Supreme Lodge, though having funds in its possession for that purpose, refused and neglected to pay the claims ; that thereupon the defendants refused to pay assessments, or to continue as members of the Order, and brought actions against it, and attached by the trustee process its funds in the hands of a bank in which they were deposited ; that since the appointment of the receiver the case of Marie L. Osgood against the Order had been tried as a test case, the receiver appearing therein for the Order, and a verdict was ordered for the plaintiff Osgood for the amount claimed.

The receiver filed his application asking the judge to determine : 1st, whether the plaintiffs, these defendants, can of right maintain the actions and secure judgment thereon ; 2d, whether the attachments are valid liens, and judgment shall be satisfied out of funds held under such trustee attachment.

On December 26, 1893, a decree was entered reciting that the bank which had been summoned as trustee in the actions in which these defendants were plaintiffs had subsequently been

ordered by the court to pay to the receiver the money held for the Order at the time of the service of the writs upon it, such payment being without prejudice to the rights of the defendants, with which order the trustee had fully complied, adjudged and ordered that, for the purpose of settling the liability of the Order, the defendants might proceed with their several actions if they saw fit; that the judgments, if in such actions any should be obtained, should be enforced against the funds in the hands of the receiver to the following extent, and not otherwise, viz. the costs accrued therein up to the time of filing the decree to be allowed as a preferred claim, and the judgment for damages to be enforced against the fund to an amount equal to the assessments theretofore paid by the judgment creditor, less sick benefits already paid to him, this amount not to be a preferred claim, but to be paid *pro rata*, so that the judgment creditor should share with the members of the Order and on the same basis; and that the defendants should be perpetually enjoined from enforcing a judgment against the fund in any other manner, but not restraining them from holding the Order otherwise liable to the full amount of the judgment, and permitting proof of claim if the actions were not prosecuted to judgment.

From this decree the defendants appealed, and the judge reported the case for the determination of this court.

F. S. Hesseltine, (*N. F. Hesseltine* with him,) for the defendants.

C. F. Kittredge, *pro se*.

FIELD, C. J. The filing of the bill and the subsequent appointment of a receiver did not dissolve valid attachments of the property of the corporation made before the bill was filed. *Atlas Bank v. Nahant Bank*, 23 Pick. 480. *Kilborn v. Lyman*, 6 Met. 299. *Hubbard v. Hamilton Bank*, 7 Met. 340, 346. *Davenport v. Tilton*, 10 Met. 320, 325. *Hills v. Parker*, 111 Mass. 508. *Columbian Book Co. v. De Golyer*, 115 Mass. 67, 69. *Sage v. Heller*, 124 Mass. 213. Even if it were held that the charter of the corporation has been annulled by the proceedings in this case, the corporation continues to exist for the term of three years, for the purpose of prosecuting and defending suits by and against it, etc. Pub. Sts. c. 105, § 41 *et seq.* As the funds attached have been paid over to the receiver by the order of the court without prejudice to the rights of the attaching parties, the

receiver takes the property subject to all valid attachments. To the extent of the property lawfully attached before the bill was filed, the claims of the defendants, if allowed to be proved, must be treated as preferred. See *Walling v. Miller*, 108 N. Y. 173.

The appointment of a receiver is not a bar to suits brought against the corporation before the bill in this case was filed, nor do such suits abate in consequence of such appointment. The receiver can appear in and defend the suits if the interests which he represents render it proper or necessary. Whether the claims of the defendants are such that actions at law can be maintained on them is a question we cannot consider in this proceeding. If they are, we see no reason why the defendants should not proceed to judgment, if they desire to do so. Whether judgments rendered after the bill was filed can be proved before the receiver, or whether the proof should be of the original demands as they existed at the time the bill was filed, made up in the same manner as other claims of the same kind, and what the effect of obtaining such judgments would be upon the right to make proof of the original demands, are questions not now before us.

The questions reported must be answered in accordance with this opinion. *So ordered.*



CHARLES T. WILDER vs. BOSTON AND ALBANY RAILROAD
COMPANY.

Norfolk. March 9, 1894. — May 18, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

*Writ of Entry — Alignment of Railroad — Filing by a Railroad Corporation of
Location — Authority of the County Commissioners.*

The Pub. Sts. c. 112, do not authorize a filing by a railroad corporation of a location including land more than five rods in width without authority from the county commissioners.

WRIT OF ENTRY, dated September 30, 1892, to recover a parcel of land in Wellesley. Plea, *nul disseisin*, with a disclaimer of any title to the demanded premises except an easement therein. Trial in the Superior Court, before *Blodgett, J.*, who

directed the jury to return a verdict for the demandant, and the tenant alleged exceptions, which, so far as material, appear in the opinion.

Samuel Hoar, (*W. Hudson* with him,) for the tenant.

G. O. Shattuck & D. C. Linscott, for the demandant.

KNOWLTON, J. Under St. 1887, c. 430, a railroad corporation, for the purpose of improving the alignment of its road, may, with the approval of the railroad commissioners, change its location, subject to the general laws in relation "to the fixing of the route of railroads, the laying out of the same, and the taking of land and the payments of damages therefor." The tenant has attempted to change its location, and has complied with the statutes in all particulars except that it has filed a location considerably more than five rods wide without having obtained from the county commissioners authority to take land outside of the location five rods in width. It desired to construct along its route four tracks. The road here runs through a cut of such depth that a greater width than five rods is needed for the tracks and the slopes and ditches on each side of them. The principal question before us is whether the tenant could legally take a strip more than five rods in width without the consent of the demandant, and without obtaining authority from the county commissioners.

The language of the Revised Statutes, c. 39, is as follows:

"§ 54. Every railroad corporation may lay out its road not exceeding five rods wide; and for the purpose of cuttings, embankments, and procuring stone and gravel, may take as much more land within the limits of its charter, in the manner provided in this chapter, as may be necessary for the proper construction and security of the road.

"§ 55. Every railroad corporation may purchase or otherwise take any land or materials necessary for the purpose of making or securing their railroad; and if they shall not be able to obtain such land or materials by an agreement with the owner thereof, they shall pay therefor such damages as shall be estimated and determined by the commissioners; and no land or materials without the limits of said road shall be so taken without the permission of the owner thereof unless the commissioners, on the application of such corporation, and after notice to

the said owner, shall first prescribe the limits within which land or materials shall be taken for the purpose aforesaid."

The provisions of Gen. Sts. c. 63, §§ 17, 19, are substantially the same. The true construction of these sections of the Revised Statutes seems to be that the words "land or materials necessary for the purpose of making or securing their railroad," in § 55, are intended to include land "for the purpose of cuttings, embankments," etc., outside of the location five rods wide referred to in § 54, and it therefore follows, under the last clause of the section, that no such land could be taken under this statute without the permission of the owner unless the county commissioners first prescribed the limits within which to take it. This interpretation has been uniformly given to the statute by the courts. In *Babcock v. Western Railroad*, 9 Met. 553, Chief Justice Shaw says: "When it is necessary to take lands of a greater width than five rods, for embankments, deep cuts, or the supply of materials, a license from the county commissioners is necessary." Language of similar import is found in *Worcester v. Western Railroad*, 4 Met. 564; *Boston & Maine Railroad v. Cambridge*, 8 Cush. 237; *Charlestown v. County Commissioners*, 1 Allen, 199, 201; and *Peirce v. Boston & Lowell Railroad*, 141 Mass. 481, 486.

The St. 1874, c. 372, is a revision and codification of the statutes in relation to railroads, including St. 1872, c. 53, which first provided for the incorporation of railroads under a general law. The provisions of this revision which we have occasion to consider were embodied in Pub. Sts. c. 112, without material change. Sections 38 to 42 of this chapter provide for the fixing of the route of a railroad to be constructed by a corporation organized under the general laws. The route is to be fixed by an agreement of the mayor and aldermen of cities and of the selectmen of towns with the directors, and, if they fail to agree, by the decision of the railroad commissioners. All this is to be done before the corporation is organized. The directors are the persons named in the articles of association to act as such until the corporation is organized and directors are chosen at the first meeting. The route must be fixed before the certificate of incorporation can be granted. The fixing of the route works no change of title, and determines nothing in regard to the amount of land which the directors will take

when they file their location. It does not even make it certain that any land will be taken, or that the corporation will ever be organized. The first proceeding which gives the railroad a title to land is filing the location. After the issue of the certificate and the organization under it, and a subscription for capital stock equal to the amount of at least fifty per cent of the cost of the railroad, and a payment to the amount of at least twenty per cent on each share, the corporation under § 45 "may locate its railroad upon the route fixed." Section 88 prescribes the width of the location in these words: "A railroad corporation may lay out its road not exceeding five rods wide." Section 89 requires the corporation to file with the county commissioners within one year "the location of the road as thus laid out." Sections 88 and 89 provide the method of obtaining additional land "for the proper construction and security of the road," and "for depot and station purposes." This is by application to the county commissioners on failure to agree with the owner, and by filing a location of land taken within the limits prescribed by them. The filing of a location is the only method prescribed by the statute in which a railroad corporation can obtain a title to land against the will of the owner. The only authority for filing a location is under the sections above referred to, one of which limits the width to five rods along the route fixed, and the other allows additional land to be taken within the limits prescribed by the county commissioners.

The language of these sections is in substance the same as that quoted from the Revised Statutes, except that under a later enactment it authorizes the taking for depot and station purposes. The cases above referred to are therefore applicable to this statute. Moreover, this very statute has been interpreted in *Norwich & Worcester Railroad v. County Commissioners*, 151 Mass. 69. The words, "without the limits of the route fixed," are used alike in §§ 91 and 92, and it is said in that case that these words "are to be read as meaning the same thing as without the limits of the road in Gen. Sts. c. 63, § 20, that is, without the limits of the road not exceeding five rods wide which a railroad corporation may lay out."

It was evidently the opinion of the Legislature that five rods in width would be as much land as railroad companies would

ordinarily need for the construction of a railroad, and that it is as much as a railroad should be permitted to take against the will of the owner without an adjudication by the proper tribunal. The fixing of the route, which is preliminary to the organization of the corporation, is merely prescribing the course along which the road shall run. It does not involve the decision of questions of this kind, and does not relieve the corporation from the necessity of complying with the law if it desires to take land outside of the location which it is permitted to file, or to cross highways at grade, or to do other things which can be done only with the consent of the county commissioners.

Exceptions overruled.

THOMAS F. O'HARE vs. WILLIAM C. JONES & others.

Middlesex. March 12, 1894. — May 18, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Liability of Public Officers — Public Policy.

The plaintiff, who was serving out a sentence at hard labor in the house of correction, duly imposed upon him for a crime of which he had been convicted, was injured by having his hand caught in a planing machine, and thereupon brought an action against the superintendent or instructor in the room in which he was set to work, against the master of the house of correction by whom the superintendent was appointed, and against the general superintendent of prisons for the Commonwealth, all of whom were public officers performing public services prescribed by statute. *Held*, that the action could not be maintained.

FIELD, C. J. This is an action of tort, against Greene, the general superintendent of prisons for the Commonwealth; against Fisk, the master of the house of correction where the plaintiff was imprisoned; and against Jones, a superintendent and instructor in the house of correction. Jones was appointed by Fisk with the approval of Greene, and Greene was appointed by the Governor of the Commonwealth with the advice and consent of the Council. Fisk was appointed by the sheriff of the county in which the house of correction was situated. The duties of these officers, so far as they are involved in the present suit, are set forth in St. 1887, c. 447; St. 1888, c. 403; St. 1891, c. 228; Pub. Sts. c. 220.

The plaintiff was serving out a sentence at hard labor in the house of correction, duly imposed upon him for a crime of which he had been convicted, and he was injured by having his hand caught in a planing machine which was used in the room in which Jones was superintendent and instructor, and upon which the plaintiff had been set to work. His contention is that he was in the exercise of due care, and that the machine was defective, out of repair, and dangerous; that he was not properly instructed in the use of the machine before he was set to work upon it, and that Jones was an incompetent instructor, as Fisk knew or might have known if he had exercised reasonable care in appointing him. His alleged cause of action against Greene and Fisk is that they were negligent in appointing Jones, and in not providing a suitable machine, and against Jones, that he was negligent in not properly instructing him in the use of the machine.

The report recites: "It was not claimed that either the defendant Greene or the defendant Fisk was present in said room at the time the injury was received, nor was it claimed that either or any of the said defendants acted or omitted to act in the premises with malice or ill will towards the plaintiff."

The presiding justice ruled that neither defendant was liable, and ordered a verdict for all the defendants; and the question is whether there was any cause of action against any one or more of the defendants.

We are unable to distinguish this case in principle from the decision in *Williams v. Adams*, 3 Allen, 171. The defendants were public officers performing a public service. Their appointment and duties were prescribed by statute. The relation of master and servant, principal and agent, employer and employee, did not exist between them and the prisoners in their custody. These officers were subject to public supervision, but there is nothing in the statutes prescribing the duties and regulating the conduct of these officers towards the prisoners in their charge which implies that the officers are to be held responsible to the prisoners in an action of damages for any neglect in the discharge of their official duties. It is inconsistent with the purpose for which prisons are established, and with the discipline which must be maintained over prisoners, that the officers should be

responsible to the prisoners in private actions for mere negligence in the performance of their duties. See *Spear v. Cummings*, 23 Pick. 224; *White v. Phillipston*, 10 Met. 108; *Dwinnells v. Parsons*, 98 Mass. 470; *Learock v. Putnam*, 111 Mass. 499.

Judgment on the verdict.

J. G. Foley, for the plaintiff.

P. H. Cooney, for the defendants.

MARY A. BIGELOW vs. WEST END STREET RAILWAY
COMPANY.

Suffolk. March 12, 1894. — May 18, 1894.

Present: FIELD, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Due Care — Alighting from Street Car.

The plaintiff, who was a passenger on an open electric car, desiring to leave it, motioned for that purpose to the conductor, who gave a signal to the motorman, and the car was slowed up gradually until it stopped at a regular stopping place with the rear platform several feet beyond the crossing of an intersecting street, as required by a regulation of the board of aldermen, and opposite a place in the street upon which it was travelling where the street pavement had been removed, and the foundation of a new road-bed consisting of rubble and cement covered with sand had been laid, but where, the paving blocks not having then been laid, there remained an excavation about six inches in depth. When the car stopped the plaintiff arose from his seat on the right-hand side of the car, took hold of the handle of the seat with his right hand, put his right foot on the running board and his left foot toward the ground, and, glancing around for approaching carriages, but not looking to see where he was stepping, stepped off into the unpaved part of the street and fell on his left side. The accident occurred in the middle of the forenoon, and there was nothing to prevent him from seeing the excavation if he had looked down, or to prevent him from alighting on the other side of the car where the pavement was in place. *Held*, that there was no evidence of negligence on the part of the defendant.

LATHROP, J. This is an action for personal injuries sustained by the plaintiff while leaving an open electric car of the defendant on Charles Street in Boston, near Chestnut Street, between nine and ten o'clock in the morning of July 14, 1892. Charles Street runs north and south, and is crossed at right angles by

Mount Vernon Street, Chestnut Street, and Beacon Street the first street named being north of Chestnut Street, and the last south of it. The car was going in a southerly direction. The seats in the car ran across it, and the plaintiff, before she attempted to leave the car, sat on the westerly side of the car, about the third seat from the front. The street pavement had been removed by the city of Boston on the westerly side of the track all of the way from Mount Vernon Street to Beacon Street, with the exception of the crossing at Chestnut Street, and in front of the door of a stable near Beacon Street. The new road-bed had been partially completed, that is, the foundation of it, consisting of rubble and cement with sand on top, had been laid, but the paving blocks, which are about six inches in depth, had not been laid. There were two car tracks on Charles Street, and the pavement between the westerly rail and the easterly side of the street was in place.

On getting near to Chestnut Street, which was a regular stopping place, the plaintiff motioned to the conductor to stop the car. He gave a signal accordingly to the motorman, and the car was slowed up gradually, and was stopped with its rear platform some feet over the crossing of Chestnut Street and opposite the excavation. The plaintiff testified that she had a parcel of sulky seats which she put under her left arm, took her lunch bag in her left hand, and with her right hand took hold of the handle of the seat on which she had been sitting, glanced round to see if there were any carriages coming, and stepped off, but did not look to see where she was stepping; that there was nothing to prevent her seeing the excavation if she had looked; and that she put her right foot on to the running board, and her left foot toward the ground, and fell on her left side. She also testified that she did not know that the excavation was there; and that she knew that the car could not stop on an intersecting street. A regulation of the board of aldermen of the city of Boston was put in evidence, which provides as follows: "No person having the control of the speed of a street railway car shall stop any such car on a cross-walk or in front of an intersecting street except to avoid collisions or to prevent danger to persons in the street."

At the close of the evidence, the presiding justice directed a verdict for the defendant; and the case comes before us on the

plaintiff's exceptions to this direction, and to the exclusion of two questions put to the plaintiff by her counsel, which related to her knowledge of the place of the accident on previous occasions.

These questions are material only upon the point whether the plaintiff was in the exercise of due care. But it is unnecessary to consider them, or to determine whether there was sufficient evidence to warrant a jury in finding that she was in the exercise of due care, as we are of opinion that the exceptions show no evidence of negligence on the part of the defendant.

A passenger on a street car has no right to expect that the street between the track and the sidewalk shall be in such a condition that he can safely pass over it. When he leaves the car he ceases to be a passenger, and becomes merely a traveller upon the highway. *Creamer v. West End Street Railway*, 156 Mass. 320.

The plaintiff, however, contends that, as there was evidence that the conductor and motorman knew the condition that the street was in, they ought not to have stopped the car where they did, or should have cautioned the plaintiff not to get off on the westerly side, or have stopped on Chestnut Street. It is a sufficient answer to the last contention, that the exceptions do not show that there was time to stop the car on Chestnut Street after the plaintiff signified her desire to leave. So far as appears, the signal to stop was given at once, and the car slowed up in the usual manner.

As to the other contentions, we are of opinion that those in charge of the car had the right to assume that the plaintiff understood the situation. She sat on the side of the car next to the excavation, and had it in sight for some distance in going between Mount Vernon Street and Chestnut Street. It was in the forenoon, and everything was plainly visible. The difference between the then level of the street and its former level was not so great as to render it especially hazardous for a passenger to leave the car there, or to make it necessary for those in charge of the car to refuse to stop the car or to caution a passenger as to alighting. While we do not say that the plaintiff was negligent, as matter of law, in not looking to see where she was stepping, it is plain that a jury would be warranted in so finding; and it seems to us, in considering the question of the negligence

of the defendant's servants, that they had a right to assume that the plaintiff would look and take heed unto her steps.

The case differs widely from that of *Richmond City Railway v. Scott*, 86 Va. 902. In that case a closed street car stopped, in the night-time, with its rear platform on the side of a trench, twelve or fourteen feet in length, fifteen feet deep, and three feet wide. A passenger stepped from the platform into the trench, and the railway company was held liable, on the ground that the car ought not to have stopped there, or the plaintiff should have been warned, and directed to leave the car by the other side.

Exceptions overruled.

F. S. Hessel tine, for the plaintiff.

M. F. Dickinson, Jr., for the defendant.

J. OTIS WARDWELL, administrator, *vs.* RUTH C. HALE
& others, executors.

Essex. March 13, 1894. — May 18, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Devise and Legacy — Postponement of Time of Payment.

A testator by his will gave to his son "the sum of ten thousand dollars, to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age. I also give to him the sum of twenty thousand dollars, to be paid to him when he shall attain the age of twenty-five years, together with the further sum of twenty thousand dollars, to be paid to him when he shall attain the age of thirty years." The son died before attaining the age of thirty years, and after the time when, had he lived, he would have reached that age, his administrator brought an action to recover the third legacy. *Held*, that the legacies vested in the son on the death of the testator, and that only the time of payment was postponed until he should reach the ages respectively prescribed.

CONTRACT, by the administrator of the estate of Edward Hale, against the executors and trustees of the will of Ezekiel J. M. Hale, to recover a legacy. Writ dated October , 1893.

Trial in the Superior Court, without a jury, before *Richardson, J.*, who ordered judgment for the plaintiff, and, at the

request of the parties, reported the case for the determination of this court, on agreed facts, in substance as follows.

By the seventh article of the will of Ezekiel J. M. Hale, who died on June 4, 1881, he gave to his son, Edward Hale, "the sum of ten thousand dollars (\$10,000), to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age. I also give to him the sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of twenty-five years, together with the further sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of thirty years. Also, I give to him the annuity of thirty-six hundred dollars (\$3,600), to be paid to him in monthly payments during his life, and at his decease I give to his wife and children, if he shall leave a wife or child alive, the annuity of twenty-four hundred dollars (\$2,400), to be paid to them or either of them until the final division of the rest and residue of my estate as hereinafter provided. Provided, however, if the wife of my said son shall re-marry, her interest in said annuity shall at once and forever cease."

Edward Hale, the legatee, was born on May 29, 1863, and died on March 25, 1890, not having attained the age of thirty years. The legacy of ten thousand dollars, payable to him on the decease of the testator or when he reached the age of twenty-one years, and the legacy of twenty thousand dollars payable to him at the age of twenty-five years, were duly paid to him in his lifetime, as well as the annuity of thirty-six hundred dollars.

The plaintiff was appointed administrator of the estate of Edward Hale on May 5, 1890, and at a time subsequent to May 29, 1893, when, had the legatee lived, he would have reached the age of thirty years, he brought this action for the recovery of the third legacy, payments of which, on demand, had been refused.

H. G. Nichols & C. K. Cobb, for the defendants.

F. L. Washburn, for the plaintiff.

FIELD, C. J. The seventh article of the will of Ezekiel J. M. Hale is as follows: "I give to my son, Edward Hale, the

sum of ten thousand dollars (\$10,000), to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age. I also give to him the sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of twenty-five years, together with the further sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of thirty years. Also, I give to him the annuity of thirty-six hundred dollars (\$3,600), to be paid to him in monthly payments during his life, and at his decease I give to his wife and children, if he shall leave a wife or child alive, the annuity of twenty-four hundred dollars (\$2,400), to be paid to them or either of them until the final division of the rest and residue of my estate as hereinafter provided. Provided, however, if the wife of my said son shall re-marry, her interest in said annuity shall at once and forever cease."

The gift of the foregoing legacies to Edward Hale except the annuity is in terms absolute, but the time of payment is postponed until the legatee reaches the ages mentioned. The \$10,000 is "to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age." The \$20,000 is "to be paid to him when he shall attain the age of twenty-five years," and the further sum of \$20,000 is "to be paid to him when he shall attain the age of thirty years." It seems impossible to distinguish between these legacies, and to hold that the first vested on the death of the testator, and that the last two did not. There is no specific gift over in case Edward Hale dies before attaining the age of twenty-one years, or of twenty-five years, or of thirty years, although there is a gift of the residue by the twenty-second article, which provides as follows: "As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in my foregoing will, and that then the said residue and

remainder, with all the accumulated interest thereof, shall be equally divided among my grandchildren *per stirpes*, to hold to such grandchildren so distributed, and to their heirs, executors, administrators, and assigns forever."

The only probable reason for postponing the payment of the legacies to Edward Hale is, that before he should reach the age of twenty-one years a guardian might be necessary, and that after he reached that age he might be less competent to manage his property at the age of twenty-one years than at the age of twenty-five or of thirty years.

The first clause of the fifth article of the will is as follows: "I give to my son, Harry H. Hale, the sum of fifty thousand dollars (\$50,000), to be paid to him at my decease; and if he shall survive me for the period of five years, but not otherwise, I direct my executrix and executors and trustees, at the expiration of five years from my death, to pay to him the further sum of fifty thousand dollars (\$50,000); but if he shall not live five years after my death, the sum of fifty thousand dollars is to remain a part of my estate." This shows that the testator knew how to use apt words when he intended that a pecuniary legacy should be contingent until the legatee reached the age when it was to be paid to him.

In other articles of the will the testator gives pecuniary legacies to be paid to other legatees when they reach a certain age, and he uses substantially the same language as in the seventh article.

The weight of authority is, we think, that the legacies to Edward Hale of \$10,000, \$20,000, and \$20,000 vested in him on the death of the testator, and that only the time of payment was postponed until he should reach the ages respectively prescribed. *Shattuck v. Stedman*, 2 Pick. 468. *Furness v. Fox*, 1 Cush. 134. *Eldridge v. Eldridge*, 9 Cush. 516, 519. See *Clafin v. Clafin*, 149 Mass. 19, 22; 1 Jarm. Wills, (Bigelow's ed.) 794. We are of opinion that the ruling of the Superior Court was right.

Judgment for the plaintiff affirmed.

ALBERT WEBER vs. JOHN D. BRYANT & others, executors.

Suffolk. March 19, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Public Charity.

A bequest of a fund to be distributed "among and applied to such objects and purposes of benevolence or charity, public or private, including educational or charitable institutions and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof," is a good public charitable bequest.

BILL IN EQUITY, filed December 18, 1893, by the plaintiff, as one of the next of kin and as assignee of the remaining next of kin of Frederick S. Weber, against the trustees and executors under the will of Frederick E. Weber, seeking to have the residuary clause thereof declared void, and to have it adjudged that, as to the portion of the testator's estate not specifically bequeathed or devised he died intestate, and to have such residue held for the benefit of his next of kin.

The residuary clause of the will is as follows:

"If, after all the aforesaid legacies and annuities are fully provided for, any surplus should remain in the hands of the trustees, I desire the same to be then distributed among and applied to such objects and purposes of benevolence or charity, public or private, including educational or charitable institutions, and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof; and I give the trustees for the time being of such remaining property and estate full power and discretion and authority to appropriate and expend such remaining property in such manner as in their judgment may best promote the objects and purposes above mentioned."

The defendants demurred to the bill, and assigned as grounds thereof, 1st, want of equity; and 2dly, that the bequest was valid, and that there was no intestacy.

The Attorney General appeared and answered that in his belief a good public charity was created.

Hearing on the bill, demurrer, and answer of the Attorney General, before *Knowlton*, J., who, at the request of the parties, reserved the case for the consideration of the full court.

C. J. Noyes, & *C. E. Lydecker* (of New York), for the plaintiff.

W. G. Russell, for the defendants.

HOLMES, J. The plaintiff represents the next of kin of Frederick E. Weber, and brings this bill for the residue of his estate. The bill goes on the footing that the will attempts to dispose of the residue upon a trust set forth, and that the trust is void. At the argument, a suggestion was made that no property was given to his trustees beyond what was necessary to pay certain legacies, which were to be paid through the hands of trustees.

We see no ground for this suggestion. Certain legacies are to be paid by the executors as soon as reasonably may be,* and

* In the seventy-first article of his will the testator provides :

“ Such of the legacies enumerated in articles one to sixty-nine inclusive as are to be paid without awaiting the legatees’ arrival at a specific age, and not including herein payments of annuities, or gifts of certain sums each year during the life of the beneficiary (except such payments on account thereof as accrue and become due within two years from my decease), and not including the provision for the support of my nephew Frederick Hausding after said two years, but meaning hereby such legacies as may be paid at once and absolutely, and such payments on account of annuities and support as become payable within two years, I desire shall be paid by my executors as soon as reasonably may be in the usual course of settlement of my estate, and be included in their probate accounts accordingly.

“ All property which may remain after such payments, and after the payment of debts, I desire to be turned over to the trustees under this my will, and I give and bequeath the same to them accordingly, as more fully herein-after provided.

“ As no one of my legatees or devisees would probably take my Lakeville Place estate, and as it may be expedient to sell the same in the course of settlement of my estate, I give full power and authority to the executors herein named, and to their substitutes and successors, whether as executors or as administrators with the will annexed, to sell at public auction or at private sale without license of court therefor, and at such price and on such terms of payment as they may deem for the interest of my estate, any real estate of which I may die seised and possessed, and any which may become part of my estate after my decease by foreclosure of mortgage or otherwise, and to make, execute, acknowledge, and deliver suitable instruments of conveyance thereof. And no purchaser of any property, real or personal, of

then "all property which may remain after such payments, and after the payment of debts," is given to the trustees. It is true that later, after explaining that certain bequests are to be paid through trustees, he says that "to that end" he gives to them "all the property and estate, of whatsoever name and nature, which may remain after the payment of my just debts, and of such legacies and other payments as are to be paid by the executors." But the words "to that end" do not cut down the amount of property given to the trustees; they only explain why he does not leave in the hands of the executors enough to pay all the legacies. Other language confirms the same view, but it hardly is necessary to cite it.

The residuary clause is as follows:

"If, after all the aforesaid legacies and annuities are fully provided for, any surplus should remain in the hands of trustees, I desire the same to be then distributed among and applied to

my estate, whether at sale by my executors, administrators with the will annexed, or by the trustees under my will, nor any corporation whose stock, bonds, or security of any kind shall be transferred upon the order of my executors, administrators, or trustees, shall be in any way liable for application of the purchase money or proceeds thereof, or by reason of such transfer.

"I also give full power and authority to my executors to adjust by compromise of arbitration, at their discretion, any and all claims not arising hereunder in favor of or against my estate, on such terms as they may deem for the interest of the estate.

"All legacies of which the payment is deferred to await the arrival of the legatee at a designated age, not reached within two years from my decease, nor before the transfer of the remaining property to the trustees under this will; all interest which may accrue and become due on such legacies after the expiration of said two years, and after such transfer to the trustees of the remaining property; all sums payable after said two years, and after such transfer of property as annuities or provisions during the life of the beneficiary; also all bequests in the articles of my will after the article relating to the New England Conservatory of Music, and numbered sixty-nine, — are to be paid through trustees, subject as herein provided, and to that end I give, devise, and bequeath all the property and estate, of whatsoever name and nature, which may remain after the payment of my just debts, and of such legacies and other payments as are to be paid by the executors, to John D. Bryant, Daniel P. Wise, and Otto Kramer, hereinbefore named, to have and to hold [to] them and their heirs, executors, administrators, and assigns forever, but in trust nevertheless," for various trusts thereafter specified.

such objects and purposes of benevolence or charity, public or private, including educational or charitable institutions and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof; and I give the trustees for the time being of such remaining property and estate full power and discretion and authority to appropriate and expend such remaining property in such manner as in their judgment may best promote the objects and purposes above mentioned."

The words "I desire," as here used, mean a command, in a polite form.

The question of the validity of the trust raised by the bill is pretty nearly settled by *Saltonstall v. Sanders*, 11 Allen, 446, which decided that a gift for "objects and purposes of benevolence or charity, public or private," with discretion as to the mode of expenditure in the trustees, was a good charity. The words of the present will evidently were copied from that case, and used in reliance upon it. We should not think of disturbing the decision. The only matter requiring consideration is whether the gift is invalidated by the words "including educational or charitable institutions, and the relief of individual need," which in the present will follow those just quoted. We are of opinion that the gift remains good. The later words are all governed by "including," and are merely specifications within the limits of the dominant phrase. As that phrase expresses good charitable purposes, and evidently has been selected because it has been decided to be valid, the relief of individual need referred to means such relief of individual need as is consistent with the validity of the gift. It is used here only as the alternative of a gift to an institution. Ultimately every charitable fund must be applied to the relief of individual need, but the trustees are given the choice of leaving the final distribution to others, or of acting as almoners themselves. See, further, *Bullard v. Chandler*, 149 Mass. 532. Of course, trustees may be allowed discretion in selecting the objects of the testator's bounty, if they are not permitted to go beyond the bounds of charity, and indefiniteness in the persons to be benefited is characteristic of public charities.

Demurrer sustained.

WALTER H. WATSON *vs.* INHABITANTS OF NEEDHAM.

Norfolk. March 19, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Constitutional Law — Eminent Domain — Breach of Contract — Damages.

A town acting through its water commissioners may legally contract to furnish a person with water for use in a boiler to make steam to heat his greenhouse.

At the trial of an action for breach of contract by a town to furnish a person with water for use in a boiler to make steam to heat his greenhouse, it appeared that in the regulations which were made part of the contract the right to shut off the water in all cases when it became necessary to make extensions or repairs, and whenever the commissioners deemed it expedient, was expressly reserved. There was evidence tending to show that the damage to the plaintiff was not caused by the exercise of this reserved right, but by a leak which remained undiscovered until after the standpipe had been emptied and there was no longer any pressure in the service pipes; and the inference was warranted that due diligence was not used to discover such leaks quickly, to shut off the flow of water to the place of the leak, and to start pumping engines so as to prevent the standpipe from being emptied. *Held*, that the court might properly find a breach of the contract.

In an action against a town for breach of contract to furnish the plaintiff with water for use in a boiler to make steam to heat his greenhouse, whereby injury was caused to his growing crop of lettuce by freezing, the ruling that the plaintiff is entitled to recover the full amount of damage is correct.

CONTRACT, to recover damages for injury to the plaintiff's growing crop of lettuce, situated in his greenhouse, caused by freezing.

At the trial in the Superior Court, without a jury, before *Blodgett, J.*, there was evidence tending to show that the water supply of the defendant town was located within the town, and a standpipe was established to furnish the necessary pressure, and the water was raised from the source of the supply, which was about a mile from the village, by pumping, for the purpose of filling the standpipe, and causing the water to circulate through the system of pipes; that the plaintiff was the proprietor of a greenhouse in which lettuce was raised, which greenhouse was heated by steam generated in a boiler under the same, and circulated through pipes; that the boiler was supplied with water from the street main of the defendant town, and was communicated from the main to the boiler of the plain-

tiff by a service pipe ; that the service pipe upon the premises of the plaintiff was provided by him with a shut-off or gate, which was under his control and management ; that when it became necessary to pass water into the boiler, the shut-off or gate was opened by the plaintiff, and the water was forced by the pressure in the street main into the boiler, and when a sufficient supply had been thus obtained the shut-off was closed, and remained closed until an additional supply in the boiler became necessary ; that after the establishment of the system of water works, the plaintiff applied to the water commissioners for a water supply for said greenhouse, which was granted, and the connection made with the street main, as before stated ; and that water had continued to be so supplied up to the time of the accident hereinafter referred to, for which the plaintiff had paid \$10 in advance, and from time to time the stipulated rates, in part in advance each time of payment, as set forth in the town regulations, which were as follows :

“ The following regulations, until further notice, shall be considered a part of the contract with every person supplied with water.

“ 1. All applications for service pipes and water must be made at the office of the water commissioners, and state fully the purposes for which the water is to be used. Water will not be introduced into any building or premises except on the written application of the owner thereof, or by a duly authorized agent. . . .

“ 3. The regular rates for the use of the water shall be payable in advance to the town treasurer on the first days of June and December of each year, except where water is supplied by special agreement. . . .

“ 11. The commissioners reserve the right to restrict the use of hose or fountain, to shut off the water in all cases when it becomes necessary to make extensions or repairs, or for violation of any of the regulations, or whenever they deem it expedient.

“ Measured water. Where water is measured, the consumer must provide and keep in repair at his expense a meter of a pattern approved by the water commissioners. Where a meter is put in for the purpose of measuring the water used by the con-

sumer, a minimum water rate, to be paid in advance, will be charged, which will cover the cost of a certain yearly quantity of water, and all water drawn in excess of such quantity shall be paid for by the thousand gallons. Where a meter is put in for the above purpose, the minimum annual rate shall in no case be less than ten dollars.

“Meter rates. A consumer using not more than 100,000 gallons of water per annum shall pay (semiannually in advance) a minimum annual rate of ten dollars, which payment shall entitle him to use forty thousand gallons of water per year for one year, and thirty cents for each and every thousand gallons of water drawn in excess of this quantity.”

There was no contract in writing between the plaintiff and the town or the water commissioners, in respect to the furnishing of a supply of water to the plaintiff, except such as appears from the application and license granted under and by said regulations.

The plaintiff testified that he was informed by Mosley and Hodge, two of the water commissioners, that he could have all the water he wanted; that he afterwards had a talk with one Leonard, who superintended the construction of the water works and at that time the management, in which Leonard informed him that he could have water, and advised him to put in a meter, in reply to the plaintiff when he proposed to put in another well if a regular and sufficient supply could not be obtained from the town; and that an application in writing was made by the plaintiff to the commissioners for water, and a connection of the town water pipes was made with the boiler of the plaintiff and water supplied, \$10 paid in advance, and other bills paid as required by the regulations.

The foregoing was all the evidence relating to the contract between the plaintiff and the defendant town, except the regulations referred to.

The plaintiff further testified, that on February 7, 1893, at six in the afternoon, he went down stairs to fill his boiler and started the water by opening the gate or shut-off, the boiler being then nearly half full of water, being the way the boiler was usually left during the daytime, during which time no steam was needed for heating purposes, and that this was

the usual time and ordinary manner of running the boiler and filling the same; that he went into the house and was gone about three minutes, and then found that the water had ceased to flow through a faucet in his house; that he then went to the boiler and put his hand on the pipe near the check valve, found that it was warm on the boiler side thereof, closed the supply gate at the boiler, and then found that no water ran through the meter by opening and closing its supply gate, which indicated that the trouble was outside of the plaintiff's premises; that the water was just in sight in the glass tubes, and that he thereupon banked his fires, and on inquiry learned from Leonard that there was a leak in the pipes in the town, and he could not tell when he could have water, but could have it before morning; that it was unsafe to run his boiler longer without further supply of water; that he had no notice of any intention to shut off the water, and could not make connection with his private supply at that season of the year in less than a day's time; that he could have filled the boiler in less than half an hour then if water had been supplied; that at twenty minutes past ten the water again commenced to run; that at twenty minutes to eleven, when he had water enough to fill his boiler, the lettuce was frozen badly; that part of it was entirely destroyed, and a part injured; that the failure of the water was caused by the opening of a joint underground at a hydrant on Central Avenue, about one mile from the centre of the village, and in a different direction from the pumping station, by the partial forcing off of the hydrant from the pipe to which it was connected, said connecting pipe having a six-inch discharge; that about three to five hours' pumping in each twenty-four hours was sufficient to furnish a supply of water and keep the proper pressure maintained; and that the water commissioners were engaged in other business, except Hodge, who had charge of the pumping station, and were accustomed to meet once a week at this time for business connected with the department, and oftener if necessary.

Hodge testified that he received notice that something was wrong while on Highland Avenue at 6.15 P. M.; that he then went to the pumping station, and found that the pressure was down, which indicated a leak; that he went with the team to find

Leonard, and met him near Highlandville ; that Leonard proceeded to find the leak, which was located on Central Avenue, and as soon as practicable closed the shut-off gates on each side of the break ; that he did not start the pump till receiving notice of the closing of these gates ; and that there was more or less ice on the ground, rendering it more difficult to find and close the gates. Hodge also testified that the pumps were started at 8.35 o'clock the same evening, and in about half an hour got pressure, which showed that the mains were then full.

Both Hodge and Leonard testified that the break was found, gates closed, and pumping resumed as rapidly as practicable. Leonard further testified that he first learned of the leak about 6.30 P. M., when he started to find it, and located it about an hour later ; that he had some difficulty in finding the shut-off gates on each side of the break, whose location was shown by plates on the surface of the ground, but succeeded in doing so about eight o'clock ; that there was a plan at the office of the commissioners, showing the exact location of all pipes, hydrants, and shut-off gates throughout the town ; that he did not take this or send for it during the search, nor did he take any assistant ; and that when the gates were shut off on each side of this hydrant, which were not far apart, water could be circulated through the rest of the system of pipes and standpipe in the town, and that no attempt to do so was made until after these gates each side of the hydrant were found and shut off.

It further appeared in evidence, and was uncontradicted by any direct testimony, that at this time there were only two gauges in the town which showed the height of water in the standpipe and the pressure in the supply pipes, one of which was at the pumping station, and the other at the residence of Hodge ; that Hodge was not at his residence during that afternoon ; and that he left the pumping station that afternoon at 3.20 o'clock, when he said everything seemed all right, and that the standpipe was full.

Expert evidence was also introduced, without objection, which was uncontradicted, in regard to the capacity of the Needham Water Works, being a written statement made by E. Worthington, Jr., civil engineer, which contained, among other things, the following :

"The hydrant in question, located 500 feet northerly of the junction of Central Avenue and Nehoiden Street, and upon Central Avenue, Needham, is supposed to be entirely disconnected from its six-inch branch pipe, and the water allowed to discharge freely through this six-inch aperture.

"The Needham standpipe is supposed to be full at the time of disconnection. The questions are: First, How long would it take to empty the standpipe by allowing this aperture to remain open? Secondly, Would the pumping plant at the Needham station be able to keep up with the flow through this six-inch aperture, and thus prevent any loss of water stored in the standpipe? To the first question my answer is, that it would take about five hours and seventeen minutes to exhaust the entire contents of the standpipe through this six-inch aperture, allowing the standpipe to be filled to the extreme top, or eighty-five feet. When filled to the ordinary high-water mark, or eighty-two feet, the time required would be five hours and seven minutes nearly. There would still remain some water in the piping system which would require perhaps an additional half-hour to exhaust through the outlet in question. To the second question my answer is, that, with both pumping engines in motion at their rated speed and capacity, they would be able to balance the leakage through the given aperture when forty feet, or about one half the standpipe, had been drawn off, and that the pumps would then maintain the pressure in the supply pipes, plaintiff's boiler, and this half-tank full, under your given conditions, without further loss in storage.

"The data from which these results were obtained are taken from the water commissioners' reports, and from facts obtained by me at their office in Needham.

"The pumping plant consists of two pumping engines whose combined capacity is 1,000 gallons per minute when delivering into the standpipe."

The defendant asked the judge to rule that the plaintiff could not maintain this action. The judge declined so to do; and the defendant excepted.

The judge found that the plaintiff was entitled to recover the full amount of damage to his lettuce, assessed damages in the sum of \$400, and reported the case for the determination of this court.

If the ruling was correct, judgment was to be entered for the plaintiff accordingly; if the plaintiff was entitled to recover only for the value of the water the defendant failed to supply him, damage was to be assessed in the sum of one dollar; and if the plaintiff was not entitled to maintain his action, judgment was to be entered for the defendant.

S. H. Tyng, for the defendant.

T. H. Wakefield, for the plaintiff.

KNOWLTON, J. The defendant town, acting through its water commissioners, undertook to furnish the plaintiff with water for use in a boiler to make steam to heat his greenhouse. It is objected that this is a use for which the town had no constitutional authority to take and furnish water, and that the contract was therefore void.

It is true that the right of eminent domain cannot be exercised to take property for a private use, and persons or corporations owning rights in streams or ponds cannot be deprived of their use of the water by an attempt to take it for the use of another merely for purposes of private gain; but it has long been settled that ponds and streams may constitutionally be taken in the exercise of the right of eminent domain for the purpose of supplying the inhabitants of cities and towns with pure water for domestic and other similar purposes. *Opinion of the Justices*, 150 Mass. 592. It may be a matter of some difficulty to determine precisely what uses are included within the public purposes for which water lawfully may be taken. In regard to uses strictly domestic there can be no doubt. We are of opinion that other uses are included, such as are fairly incidental to the ordinary modes of living in cities and large towns, and as involve the operation of motors requiring but a small quantity of water which may reasonably be supplied from an aqueduct of such capacity as would be needed to meet the ordinary requirements of the inhabitants for domestic and other similar purposes. We are of opinion that the use in the present case was one for which the town might legally furnish water.

The terms of the contract were not expressed in full, but were left in part to implication. In construing the contract, we must consider the situation of the parties and their relation to the subject with which they were dealing. The town was acting in

the performance of a public duty in supplying water for public use, and incidentally was making contracts with individuals adapted to the circumstances of each particular case. It would not be expected to guarantee a supply of water against all contingencies, but only to guarantee proper effort to insure a constant supply. In the regulations which were made part of the contract the right to shut off the water in all cases when it becomes necessary to make extensions or repairs, and whenever the commissioners deem it expedient, was expressly reserved; subject only to that reserved right, the town was bound to use reasonable care and diligence to have ready for delivery a sufficient supply of water for the plaintiff's use, so long as the contract remained in force. *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556.

There was evidence from which the court was warranted in finding a breach of this contract. The damage to the plaintiff did not result from the exercise of the reserved right to shut off the water. It was caused by a leak which remained undiscovered until after the standpipe had been emptied, and there was no longer any pressure in the service pipes. The testimony of the expert, and the other facts of the case, warranted the inference that due diligence was not used to discover such leaks quickly, and to shut off the flow of water to the place of the leak, and to start the pumping engines so as to prevent the standpipe being emptied.

It was not contended that the plaintiff was in fault, nor that the town should be relieved from liability on the ground that it was not accountable for the neglect of the water commissioners. *Hand v. Brookline*, 126 Mass. 324. *Neff v. Wellesley*, 148 Mass. 487.

The ruling in regard to the amount of damages recoverable was correct. *Stock v. Boston*, 149 Mass. 410.

Judgment on the finding.

JAMES J. DONAHUE vs. GEORGE F. PARKMAN.

Suffolk. March 19, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mortgage — Foreclosure Sale — Action to recover Money deposited — Forfeiture.

A purchaser at a sale by auction who has made a deposit of money under an agreement that it shall be forfeited to the use of the seller if he fails to comply with the terms of the sale, cannot recover back the deposit; and the fact that the sale was made by the defendant as mortgagee does not give the plaintiff any additional rights, considering him simply as a purchaser; nor does the fact that he participated in the scheme of the agent of the owner of the equity to delay the foreclosure of the mortgage by pretending to buy the property give him any better standing in court.

CONTRACT, for money had and received by the defendant to the plaintiff's use, being a deposit of five hundred dollars at a sale by auction, under an agreement that it should be forfeited to the seller if the purchaser failed to comply with the terms of the sale. Trial in the Superior Court, without a jury, before *Hammond, J.*, who found for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

C. F. Eldredge, for the plaintiff.

C. C. Read, for the defendant.

LATHROP, J. By the terms of the sale, which was for cash, five hundred dollars were to be "paid at sale into the hands of the auctioneer, to be forfeited to the use of the seller in case the purchaser shall fail to comply with the residue of the terms of the sale; a forfeiture of said sum not to release the purchaser from his liability under this contract; the balance of the amount to be paid, and settlement to be made, and deed to be delivered at the office of the auctioneers at or before 2 o'clock P. M. on Tuesday, the third day of January, A. D. 1893."

The paper signed by the purchaser, the plaintiff in this action, acknowledged the purchase of the estate for \$13,000, and proceeded as follows: "And I hereby agree to comply with the terms of the sale as stated by the auctioneer and hereto annexed; and having paid into the hands of the auctioneer the sum of five hundred dollars, agreeably to said terms of sale, I

hereby agree to forfeit said sum to the use of the seller should I fail to comply with the residue of said terms."

It is not contended that there was anything unreasonable in the terms of the sale; and it could not be so said as matter of law. *Model Lodging House Association v. Boston*, 114 Mass. 133. *Pope v. Burrage*, 115 Mass. 282. *Wing v. Hayford*, 124 Mass. 249.

The justice, who tried the case without a jury, having found for the defendant, it must be assumed that the fact that the sale was not carried out was the fault of the plaintiff.

The first and principal question is whether a purchaser at a sale by auction, who has made a deposit of money under an agreement that it shall be forfeited to the use of the seller if he fails to comply with the terms of the sale, can recover back the deposit. It is well settled that he cannot.

If the contract had contained the words that the deposit was "to bind the bargain," the case at bar would be governed by that of *Kelly v. Thompson*, 101 Mass. 291, 299, where it was held that, if the purchaser did not make the deposit and refused to comply with the terms of the sale, an action would lie against him for the deposit, although the property was afterwards sold for more than it brought at the first sale.

Sometimes the deposit is called "an earnest" in the agreement, and then it is clear that it cannot be recovered back. *Hinton v. Sparkes*, L. R. 3 C. P. 161. *Catton v. Bennett*, 51 L. T. (N. S.) 70. See also *Sage v. Central Railroad*, 99 U. S. 334, 344, where a decree of foreclosure by sale of the property of a railroad corporation, which provided that a purchaser should be required to pay at once a part of his bid, as "earnest money," was approved by the court.

It is held in other cases that, even if there is no clause of forfeiture in the agreement, a purchaser who violates his contract cannot recover the deposit. *Ex parte Barrell*, L. R. 10 Ch. 512. *Depree v. Bedborough*, 4 Giff. 479. *Howe v. Smith*, 27 Ch. D. 89.

Where the agreement contains a clause of forfeiture, the authorities generally agree that the deposit cannot be recovered back. In *Kelly v. Thompson*, it is said by Mr. Justice Ames: "When a purchaser expressly stipulates that a payment on account,

actually made by him, is to be forfeited if by his own fault the purchase shall not go into effect, he may reasonably be understood to mean that it shall not be reclaimed in whole or in part. The distinction between a penalty and liquidated damages does not apply to a case of that description." 101 Mass. 299. So, in *Howe v. Smith*, *ubi supra*, the deposit is said by Lord Justice Fry to be not merely a part payment but "an earnest to bind the bargain." To the same effect is *Soper v. Arnold*, 35 Ch. D. 384. See also *Cooper v. London, Brighton, & South Coast Railway*, 4 Ex. D. 88; *Thomas v. Brown*, 1 Q. B. D. 714; *Best v. Hammond*, 12 Ch. D. 1.

In other cases a deposit with an agreement for forfeiture is treated as liquidated damages. *Lea v. Whitaker*, L. R. 8 C. P. 70. *Essex v. Daniell*, L. R. 10 C. P. 538. *Mathews v. Sharp*, 99 Penn. St. 560. *Tingley v. Cutler*, 7 Conn. 291.

The fact that the sale by the defendant was made by him as mortgagee does not give the plaintiff any additional rights, considering him simply as a purchaser. Nor do we see that the fact that he participated in the scheme of Alfred A. Marcus to delay the foreclosure of the mortgage by pretending to buy the property gives him any better standing in court.*

* It appeared that on December 28, 1892, seven days after the foreclosure sale, a bill in equity to redeem the premises was brought in the name of Maryann Marcus, the owner of the equity, and notice thereof duly recorded with Suffolk Registry of Deeds; that thereupon the plaintiff (although the defendant had sent his fully executed deed to the office of the auctioneers at the time appointed, and in all respects had fulfilled the agreements on his part to be observed) refused to carry out the further terms of his agreement or to pay the balance of the purchase money, demanded back the amount of his deposit, alleging as a reason for so doing the filing of the *lis pendens* and the pendency of the bill in equity, and on January 3, 1893, commenced the present action against the defendant. It also appeared in evidence that Maryann Marcus, the owner of the equity in the real estate, was the invalid daughter of Alfred A. Marcus, who purchased the real estate in his daughter's name; that in all matters relating to the real estate from the time of its purchase Alfred A. Marcus had taken full charge of the property in behalf of his daughter, had managed it, and had acted at all times as her fully authorized agent; that so acting he had wished to bid in the property to delay the foreclosure if the price brought at auction should not be satisfactory to him as such agent; that the plaintiff was a hack driver with a business stand near the office of Alfred A. Marcus, and had had nothing whatever to do with regard to the mortgaged premises until just before the foreclosure

We have no occasion to consider what the rights of the owner of the equity of redemption would be, in a bill brought to redeem the mortgage, to a deposit received by the mortgagee from a purchaser who had failed to carry out his agreement. No such question arises here.

The rulings requested by the plaintiff were, therefore, properly refused; and the order must be

Exceptions overruled.

sale, when Alfred A. Marcus called him into his office and engaged him to attend the foreclosure sale in behalf of the owner of the equity, for the purpose aforesaid; that the plaintiff then attended the foreclosure sale, in company with the son of Alfred A. Marcus and Mr. Burton, the attorney of Alfred A. Marcus, as agent aforesaid; that when the real estate was bid off by the plaintiff, he with the son and the attorney stepped up to the auctioneer, and the amount of the deposit money, five hundred dollars, was then handed by the son to the plaintiff, and in turn by the plaintiff at once to the auctioneer. It also appeared in evidence that the five hundred dollars had been furnished by Alfred A. Marcus to his son for this purpose, and the plaintiff had no interest in the money except to act for Marcus as aforesaid. It further appeared that the bill in equity to redeem was brought by Alfred A. Marcus as agent aforesaid, for the purpose of giving the plaintiff an excuse for not complying with the terms of the memorandum, and for the purpose of carrying out his original purpose of delaying the foreclosure by sale, intending also to redeem; that on June 9, 1893, the defendant was fully paid the amount of his mortgage claim, with interest and costs, the money coming from Alfred A. Marcus as agent, and that the defendant, at the request of Alfred A. Marcus as agent, then assigned to some person other than the plaintiff or the owner of the equity or the said Alfred said mortgage, and in consideration thereof, on June 12, 1893, entry was made by agreement on the records of the court, "Bill dismissed, with costs"; and also that when Alfred A. Marcus paid the defendant the amount of his mortgage claim as aforesaid, the matter of the deposit money, five hundred dollars, was mentioned, but was distinctly left out of the settlement. It further appeared that the plaintiff did not notify the defendant or the auctioneer, at the time he paid the money or ever afterwards, that he was acting in any other capacity than for himself, and the fact that he was acting as the agent of the owner was not known either to the defendant or to the auctioneer until after the defendant had received the money for his mortgage and had assigned it as aforesaid.

OLD COLONY RAILROAD COMPANY *vs.* ROCKLAND AND
ABINGTON STREET RAILWAY COMPANY.

Suffolk. March 20, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity Jurisdiction — Statute — Street Railway — Railroad.

When a street railway corporation is constructing its road, in accordance with the powers conferred upon it by its charter, over a location granted to it by the selectmen of a town, and is using or intending to use the safeguards pointed out by the statutes of the Commonwealth, this court has no power to say that it must use other and different safeguards.

This court will not consider questions not raised in the court below, and about which nothing appears in the evidence reported.

LATHROP, J. This is a bill in equity, to restrain the defendant, a corporation operating a street railway by electricity, from crossing the tracks of the plaintiff's railroad at grade at North Avenue in Abington.

At the hearing before a single justice it appeared that the defendant was a duly organized street railway corporation, and that it had received a location from the selectmen of Abington, which authorized it to lay its tracks over certain streets, including North Avenue. The plaintiff contends that, even if the defendant has complied with all the requirements of the statutes, this court has jurisdiction in equity to regulate the manner in which it shall operate its road, and to direct it to construct suitable and necessary signals, safeguards, and appliances for the safety of the public travelling upon the plaintiff's railroad. We are of opinion that we have no jurisdiction to grant the relief prayed for.

By the Pub. Sts. c. 118, § 7, the selectmen of a town are empowered to grant a location of a street railway "under such restrictions as they deem the interests of the public may require."

Section 40 provides: "A street railway company whose track crosses the tracks of a steam railroad shall make the crossing in such a manner as to injure as little as possible such tracks; and shall not insert frogs therein, or make incisions into the rails thereof, without the consent of the directors of such road."

Section 41 provides: "When a street railway crosses at the

same level a steam railroad where locomotive engines are in daily use, every driver of a car upon the street railway shall, when approaching the point of intersection, stop his car within one hundred feet of the crossing."

By § 39, "A street railway company may use such motive power on its tracks as the board of aldermen of cities or the selectmen of towns through which it is located may from time to time permit."

The only power of this court to act in equity which is directly given by statute is found in § 63, which provides: "The Supreme Judicial Court shall have full equity powers to compel the observance of all laws governing street railway companies, and of all orders, rules, and regulations made in accordance with this chapter by the board of aldermen of a city, or the selectmen of a town, or by the board of railroad commissioners, and may compel such observance upon the petition of the mayor and aldermen of any city or the selectmen of any town in which the street railway is located." The case at bar does not fall within this section.

Under our general equity powers, conferred by the Pub. Sts. c. 151, § 4, we are of opinion that, when a street railway corporation is constructing its road, in accordance with the powers conferred upon it by its charter, over a location granted to it by the selectmen of a town, and is using or intending to use the safeguards pointed out by the statutes of the Commonwealth, we have no power to say that it must use other and different safeguards. The whole subject matter is regulated by the Legislature. Our duty is merely to see that the law is complied with, and not to interfere unless either the Constitution or the law requires us to do so.

The absurdity of any other rule is shown by what we are asked to do in this case. It is gravely argued that we should compel the defendant to put frogs in its tracks and have interlocking signals to protect the crossing. This, as appears from the testimony, would in the first instance cost about \$6,000, and would require to maintain the system an expense of about \$1,500 a year. And this is a system which the witnesses testify they have never known to be used by a street railway crossing the tracks of a steam railroad at grade.

The plaintiff further contends that the location was not proof of a right to cross the tracks, because it does not appear that it was accepted by the directors in writing within thirty days after they received notice thereof, as required by the Pub. Sts. c. 113, § 7. Also that it does not appear that it had filed a certificate of payment of fifty per cent of its capital stock, as required by the Pub. Sts. c. 113, § 19.

These questions were not raised in the court below, and nothing appears in regard to them in the evidence reported, with the exception that it was conceded that the defendant had a charter and a location.

The bill alleges that the defendant "has no right to enter upon and construct a railroad upon and over said location and tracks of the plaintiff." This allegation it was the duty of the plaintiff to prove. It made certain concessions, and directed its evidence to a single point, namely, whether it was consistent with safety for the defendant to cross its tracks without the use of certain appliances. If there was any other ground for its contention that the defendant had no right to cross its tracks, it should have put in evidence to prove it.

The result is, that the decree of the single justice dismissing the bill with costs must be

Affirmed.

J. H. Benton, Jr., for the plaintiff.

G. W. Kelley & W. J. Coughlan, for the defendant.

JOHN W. MCKIM, Judge of Probate, *vs.* WASHINGTON
GLOVER, administrator.

Suffolk. March 19, 20, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trust — Breach of Condition of Bond by Trustee — Action — Statute of Limitations — Exoneration of Sureties — Case stated.

A breach of a condition of the bond of a trustee to "manage and dispose of all such estate, and faithfully discharge his trust in relation thereto, according to law and to the will of said testator," is distinct from a breach of a condition requiring that the trustee shall "at the expiration of his trust settle his

account, . . . and pay over and deliver all the estate remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto"; and though an action against the administrator of a surety on the bond for a breach in the lifetime of the surety of the first condition would, under the provisions of Pub. Sta. c. 136, § 9, be barred at the expiration of two years from the appointment of such administrator, yet an action for a breach of the second condition, occurring after the death of the surety and more than two years after the appointment of his administrator, is not so barred.

It is an improper investment of a trust fund for a trustee to buy of himself with it a mortgage of real estate which is worth less than the amount of the fund so invested, and the subsequent conduct of the *cestui que trust*, influenced by the false representations of the trustee as to the value of the property, in authorizing the trustee to bid off the property for him at a foreclosure sale, and in accepting a conveyance of it to prevent a sacrifice, and, upon learning the facts, in demanding that the trustee should take back the property, and account for the sum invested in the mortgage, is a repudiation of the transaction, and not an exoneration of the sureties upon the bond of the trustee.

Upon a case stated, with the right reserved to either party to show any further facts, such further facts may be shown as well by inference from the facts admitted as by independent evidence.

• CONTRACT, against the administrator of a surety on the bond of a trustee given to the plaintiff as judge of the Probate Court for the County of Suffolk. Writ dated October 24, 1892. Answer: 1. A general denial. 2. The statute of limitations.

The case was submitted to *Barker, J.*, and by him reserved and reported for the consideration of the full court, upon the following agreed facts, in which the right was reserved to either party to show any further facts material to the case.

By the will of Isaac B. Woodbury of Norwalk in the State of Connecticut, which was duly admitted to probate in this Commonwealth, certain trusts were created, and Charles S. Nichols of Salem was named as trustee. In December, 1885, Nichols duly qualified as trustee, and as such gave a bond upon which Henry P. Nichols, the defendant's intestate, became bound as surety. The second condition of the bond required the trustee to "manage and dispose of all such estate, and faithfully discharge his trust in relation thereto, according to law and to the will of said testator," and the fourth condition required that he should "at the expiration of his trust settle his account in said court, and pay over and deliver all the estate remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto." On the settlement of the final account of the trustee, on September 15, 1892, there appeared to be due from

him to the beneficiaries under the will a sum of money, which he, being then insolvent, on demand refused to pay. The sum for which he was so chargeable was the principal and interest of a mortgage originally held by him individually, and afterward, in 1886, by mesne assignments transferred to him as trustee for \$8,000, being more than the value of the mortgaged property. In 1888 the beneficiaries under the will requested the trustee to foreclose the mortgage, and accordingly, on April 30, 1888, having made due entry to foreclose, he sold the premises at auction under a power of sale contained in the mortgage, and, pursuant to a written request of the beneficiaries that "in case the premises covered by mortgages to yourself as trustee do not find a purchaser at sale for more than enough to cover the amount of mortgages, interest, and charges, we hereby request you to bid them in for us," he bid off the property in question for \$7,500, that being the highest bid made for the beneficiaries, and being \$500 in excess of any other bid made at the auction, and, at the request of the beneficiaries, conveyed it to one Neilson, in whom the title to the premises still remains, although tender of a deed of the same has since been made by him to the trustee and declined. This investment was subsequently held to be a breach of trust, and was disallowed by the Probate Court, and by this court on appeal in *Nichols, appellant*, 157 Mass. 20. Neither the investment, nor the breach of trust, nor the foreclosure sale, was ever known to the defendant's intestate, nor until after March 1, 1892, to the defendant himself. The defendant was appointed administrator on January 20, 1890, and his bond as such was approved on February 3, 1890.

F. Rackemann, (F. V. Balch with him,) for the defendant.

J. B. Lord, for the plaintiff.

HOLMES, J. This is an action against the administrator of a surety on a trustee's bond. The breach of trust which was the source of the trouble is that which was considered in *Nichols, appellant*, 157 Mass. 20, and is not disputed. It took place in 1886. The administrator's bond was approved on February 3, 1890. The present suit was not begun until October 24, 1892, and it is argued that the action is barred by the special statute of limitations. Pub. Sts. c. 136, § 9. Whether it is so or not depends, of course, on when the right of action on the trustee's bond accrued. *Ibid.* § 13.

The second condition of the trustee's bond is to "manage and dispose of all such estate, and faithfully discharge his trust in relation thereto, according to law and to the will of said testator." We assume that this was broken in 1886, and that the action on the bond is barred so far as it is concerned. The fourth condition is, "at the expiration of his trust settle his account in said court, and pay over and deliver all the estate remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto." Technically this condition was broken by a failure to pay over on settlement of the final account, on September 15, 1892. If this breach gave a new cause of action it is admitted that the present suit is in time. It is not argued that there might not be a new liability for a substantially new breach within two years. *Cobb v. Kempton*, 154 Mass. 266, 269. *Sanders v. Coward*, 13 M. & W. 65, 71. *Thruston v. Blackiston*, 36 Md. 501, 510. Wood, Limitations, (2d ed.) § 175. But it is argued that the substance of the grievance is the same as before, and therefore that there ought to be no new cause of action. But this is misleading. The grievance in an action of contract upon a bond like this is not the breach of trust *per se*, but the breach of condition. *Sanders v. Coward*, 13 M. & W. 65, 71. There may be as many conditions in a bond as there are different aspects, incidents, or consequences of the same substantive wrong, and each breach of condition gives rise to a distinct grievance. It is plainly a question of the language of the contract. Even if the object of the several conditions were indemnity against precisely the same evil, it would not follow that the statute would begin to run on all of them at the same time. *Bullard v. Moor*, 158 Mass. 418, 423. *Cobb v. Kempton*, 154 Mass. 266, 269. But there is a plain distinction between the two things secured. A man may be guilty of a breach of trust, and yet pay over the whole amount with which he is charged on final settlement. By the language of the bond the defendant is liable, and while there are no equities against a surety, on the other hand there is no reason for not holding him to the language and meaning of his undertaking. So far from seeing anything absurd in allowing a *cestui que trust* to enforce his stipulated right to have the whole trust fund paid over at the end of the trust, we think that it would be unjust and impolitic

to deprive him of it, however old the original breach of trust may be.

The case of *State v. Henderson*, 54 Md. 332, relied on by the defendant, has no bearing upon the question before us. What was decided by the majority there was that on a guardian's obligation to exhibit a final account and to deliver up the property upon his ward's coming of age, the statute of limitations began to run when the ward came of age, and that there was not a new breach if an account was passed at a later date and there was a subsequent failure to deliver up the property. If the trustee had resigned before the defendant was appointed administrator, and had not accounted until September, 1892, this decision might have some relevancy, that is, it might bear on the construction of the fourth condition; but it throws no light on the relation of the fourth condition to the second. Compare *Cobb v. Kempton*, 154 Mass. 266, 269. *People v. Seelye*, 146 Ill. 189, 208.

It is argued further, that the conduct of the beneficiaries has exonerated the sureties. To this it is enough to answer, that the judge who tried the case found the other way, and that we cannot say that he was wrong. The facts agreed are not a case stated with no power to draw inferences, as in *Old Colony Railroad v. Wilder*, 137 Mass. 536, 538. Right was reserved to either party to show any further facts, and this could be done as well by inference from the facts admitted as by independent evidence. But there is nothing in the agreed facts which warrants an argument that the beneficiaries misled the sureties in any way. See *Watertown Ins. Co. v. Simmons*, 131 Mass. 85. Their conduct in buying in the property at the foreclosure sale seems to have been for the benefit of all concerned by preventing a sacrifice, and to have been based on the false representations of the trustee. So far from there having been any election to confirm the investment, the beneficiaries seem to have repudiated it as soon as they knew the facts. *Nichols, appellant*, 157 Mass. 20, 23. It is not necessary to consider whether there are other answers to the argument. See further *White v. Weatherbee*, 126 Mass. 450, 452; *Braiden v. Mercer*, 44 Ohio St. 339; *Stovall v. Banks*, 10 Wall. 583.

Judgment for the plaintiff.

JOSEPH ROTHROCK vs. DWELLING-HOUSE INSURANCE
COMPANY.

Suffolk. March 20, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Action on Foreign Judgment — Jurisdiction — Service of Process.

In an action upon a foreign judgment it is proper to inquire into the jurisdiction of the court in which the judgment was rendered to ascertain whether the defendant appeared, and, if not, whether legal service was made upon him.

An action cannot be maintained in this Commonwealth upon a judgment rendered in Arkansas against an insurance company incorporated here on a policy of insurance issued to a resident of that State, where the company, having no place of business in Arkansas, except as certain persons solicited insurance for it there, had not filed with the auditor of that State, as required by statute, a written stipulation that legal process affecting it served on the auditor should have the same effect as if served personally on it, and where service of process in the action in which the judgment was rendered was made only on the auditor, and not on the company.

CONTRACT, on a judgment for \$300, recovered on January 25, 1892, in the Circuit Court of Boone County in the State of Arkansas, on a policy of insurance issued by the defendant. Writ dated August 9, 1892.

Trial in the Superior Court, without a jury, before *Richardson, J.*, who found for the plaintiff, and, at the request of the parties, reported the case for the determination of this court, on agreed facts, the substance of which appears in the opinion. If the finding was correct, judgment was to be entered for the plaintiff; otherwise, judgment was to be entered for the defendant.

H. Wheeler, for the defendant.

F. B. Hemenway, for the plaintiff.

KNOWLTON, J. It appears by the agreed facts that the judgment on which this action is brought was rendered in Arkansas without service of process on the defendant, and that the defendant had no notice or knowledge of the suit until long afterwards. The defendant was incorporated in Massachusetts, and had no place of business in Arkansas except as certain

persons solicited insurance for it there and sent the applications to the office of the defendant in Chicago, Illinois, where policies were issued.

In an action upon a foreign judgment it is proper to inquire into the jurisdiction of the court in which the judgment was rendered to ascertain whether the defendant appeared, and, if not, whether legal service was made upon him. *Gilman v. Gilman*, 126 Mass. 26. *Wright v. Andrews*, 130 Mass. 149. In the present case service was made in the original action on the Auditor of the State of Arkansas, and the only question is whether such service was authorized, and was sufficient under the statute of that State. The language of the statute is as follows:

"Sect. 3834. No insurance company, not of this State, nor its agents, shall do business in this State, until it has filed with the auditor of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this State. And if such company should cease to maintain such agent in this State, so designated, such process may thereafter be served on the auditor; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified except that a new one may be substituted, so as to require or dispense with service at the office of said company within this State, and that such service, according to this stipulation, shall be sufficient personal service on the company. The term 'process' includes any writ, summons, subpoena, or order, whereby any action, suit, or proceedings shall be commenced, or which shall be issued in or upon any action, suit, or proceedings.

"Sect. 3835. Any person or persons, or corporation, receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or association not of this State, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the school fund of the State the sum of five hundred dollars for each month or frac-

tion thereof during which such illegal business was transacted, and any company not of this State, doing business without authority, shall forfeit a like sum for every month or fraction thereof, and be prohibited from doing business in this State until such fines are fully paid." Statutes of Arkansas of 1884.

The defendant had filed no stipulation as required by this statute. The persons forwarding applications, and the corporation itself, were therefore liable to fines, and the corporation was also prohibited from doing business until the fines should be paid. There is no provision for service on the auditor when no stipulation is filed, and in such cases the policy holders are left to pursue their remedies on their policies in jurisdictions where they can get a valid service, while the corporation and its agents are punished for their violation of law. In § 3835 business done without filing the stipulation is called illegal, and we see nothing to indicate that the object of the statute is to make the business regular, or to authorize a service upon the auditor when no stipulation is filed. We do not consider the decision of the county court in Arkansas in the original action an exposition of the statute which is authoritative and binding upon us, and we are not inclined to follow the case of *Ehrman v. Teutonia Ins. Co.* 1 Fed. Rep. 471, and 1 McCrary, 128, in which it is held that the defendant was estopped to deny the jurisdiction. That case differed from this inasmuch as the defendant there had notice of the suit, and appeared and sought to set up a want of jurisdiction, although perhaps this difference is not very material. We do not doubt the doctrine that a corporation doing business in a foreign state thereby subjects itself to the statutes of that state. *Reyer v. Odd Fellows' Fraternal Accident Association*, 157 Mass. 367. *Lafayette Ins. Co. v. French*, 18 How. 404, 408. *Railroad Co. v. Harris*, 12 Wall. 65, 81. But it seems to us that the question before us is not whether the defendant would be estopped from setting up its failure to comply with the law to relieve itself from liability under its contract, but whether the plaintiff presents a case which comes within the terms of the statute on which the jurisdiction of the court must be founded. Unless the statute applies to a case like this, the service was improperly made, and it is as if there had been no service. In our opinion, unless the stipulation is filed, a foreign insurance com-

pany has no right to do business in the State, and if it violates the law in that respect no service can be made upon the auditor, and no jurisdiction can be obtained there on which to found a judgment against it. The remedy provided is by a punishment of the corporation, and of such others as have disregarded the requirements of the statute. Suits may be brought upon the contracts in any State where jurisdiction can be obtained. *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221. *Lamb v. Bowser*, 7 Biss. 315, 372. *Union Ins. Co. v. McMillen*, 24 Ohio St. 67.

Judgment for the defendant.

JAMES A. FEELY vs. PEARSON CORDAGE COMPANY.

Suffolk. March 20, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Due Care — Assumption of Risk.

A person had been employed for four or five weeks in the basement of a factory in the floor of which at one end was an open well four or five feet across and two or three feet deep, filled with water to within a few inches of the surface, and used for the purpose of catching the drippings of water formed by the condensation of steam in the engine which stood near. He was aware of the existence of the well, but was ignorant of its uses. In the course of his employment he had occasion to go to a barrel standing near the well to procure washers for his machine, and on one such occasion, while stooping to pick up a washer which had fallen to the floor at the side of the barrel from which it had been taken, he slipped and fell so that his legs went into the water in the well and were scalded. *Held*, that it was an injury of which he assumed the risk, and that he could not maintain an action therefor. *Held, also*, that it was immaterial that he did not know the precise extent or character of the injury which he would sustain if he fell into the well.

TORT, for personal injuries occasioned to the plaintiff by falling into a well of hot water in the defendant's factory. Trial in the Superior Court, before *Corcoran*, J., who resigned shortly thereafter, and by the agreement of counsel a bill of exceptions was subsequently allowed by *Bond*, J., in substance as follows.

The plaintiff prior to the accident, which occurred on April 22, 1892, had been employed by the defendant for four or five

weeks in the basement of its factory on a roping machine. In the floor of the basement, at one end, was an open tank or well four or five feet across and two or three feet deep, filled with water to within a few inches of the surface of the basement floor. The well was used to catch the drippings of water formed by the condensation of steam in the engines which were near it. It was uncovered, and the floor about it was wet and slippery. From the well the water ran through an overflow pipe into the sewer. For most of the time that the plaintiff worked for the defendant he knew of the well, but was ignorant of the purpose for which it was used. In the course of his employment he had occasion to go to a barrel, which, according to different witnesses, stood from three to ten feet from the well, to get washers for his machine. On the day of the accident, at about half-past ten o'clock in the forenoon, he had placed his tea on a pump which was about two feet from the well to be heated, and as he returned from heating his tea he stopped at the barrel to get some washers out of it, and as he stooped to pick up one which had fallen to the floor he slipped and fell, and both of his feet went into the well, and his legs were scalded up to the knees.

At the close of the evidence the defendant requested the judge to rule that the action could not be maintained. The judge declined so to rule; and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

J. Lowell, Jr. & S. H. Smith, for the defendant.

E. Greenhood, for the plaintiff.

MORTON, J. For most of the time during the four or five weeks that the plaintiff had been working for the defendant he had known of the well. Sometimes the barrel from which he got the washers was nearer to, and sometimes farther from it. The defendant was under no obligation to the plaintiff to cover the well or keep the floor dry. *Murphy v. American Rubber Co.* 159 Mass. 266, and cases cited. The danger of slipping or of falling into the well was an obvious one, and the plaintiff must be held to have assumed the risk. It does not matter that he did not know the precise extent or character of the injury which he would sustain if he fell into the well. Such a test would introduce an impracticable element into the doctrine of assumption of the risk. It is enough that he knew that he might fall

into the well, and continued at his employment without objection. He must be held to have assumed the risk of whatever injury he might receive by falling into the well. It is not necessary to consider whether the plaintiff was in the exercise of due care, or was acting within the scope of his employment.

Exceptions sustained.

THOMAS W. BICKNELL & another vs. NEW YORK AND NEW
ENGLAND RAILROAD COMPANY.

Suffolk. March 21, 1894. — May 18, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trespass — Abandonment of Railroad Location — Evidence.

At the trial of an action of trespass involving the determination of the ownership of a strip of land, it appeared that the strip in question lay between two lines, one of which was two rods and the other two and a half rods westerly of the central line of the defendant's railroad, which there ran nearly north and south; that the original location of the railroad at that point was five rods wide; that when the location was filed the owner of land included in the location lying next easterly of the strip in question, the boundary line of which separating it from this strip was two rods westerly from the centre line of the location, was also the owner of four other lots southerly of and adjoining the lot lying next easterly of the strip in question, through which the location ran, leaving him the owner of the portions of those lots lying on each side thereof; that after the location was filed, he filed a petition before the county commissioners asking for an assessment of the damages for the taking of the land, in which he alleged that the land taken "for the building of said railroad and for railroad purposes" along the edge of the first of these lots, and through the other four lots, was a strip "four rods in width or thereabouts"; that upon this petition the county commissioners, as appeared by the record of their proceedings, which was admitted in evidence, awarded damages, describing the land taken as it was described in the petition; that by an agreement between him and the railroad company, which, together with a deed therein referred to, were introduced in evidence, both bearing the same date as the decree of the county commissioners, it appeared that the defendant was to pay to such owner, within three years from that date, the damages awarded by the county commissioners, and was to receive deeds for all of these lots covering the strip four rods wide through them all, these deeds being delivered in escrow with a provision that any deed might be taken by the company on payment of that portion of the money which was mentioned as the price of the land conveyed by it, and that, if the whole amount was not paid within three years, the deeds should be returned to the grantor, and the railroad company should have no right to the land except that derived from its location, and should be liable for the

payment of the commissioners' award; that the sum mentioned in the agreement was not paid within the time limited therein, and the deed of the lot next easterly of the land in question which had been delivered in escrow was never delivered to the railroad company, although under the agreement it was to be inferred that the land was afterwards paid for in accordance with the award of the county commissioners; and that this deed described by metes and bounds the strip four rods wide, and to the description were added the words "the same being the track or road-bed of said" railroad company "four rods in width." *Held*, that the facts disclosed by the agreement and deed tended to show that of the estate of such owner the railroad company took and paid for a strip of land only four rods wide next easterly of the land in question and extending southward through the next four lots, and that the remainder of the land included in the original location along that line was abandoned, and that these papers, taken in connection with the record of the county commissioners, were competent as tending to show that the railroad company also abandoned the strip of land in question.

TORT, for trespass in the erection of a fence on a strip of land alleged to belong to the plaintiffs, situated near the Harvard Street station on the defendant's railroad, in the city of Boston. Writ dated April 18, 1891.

At the trial in the Superior Court, before *Aldrich, J.*, the jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, the nature of which appear in the opinion.

F. A. Farnham, for the defendant.

W. S. Pinkham, for the plaintiffs.

KNOWLTON, J. This case involves the question whether a strip of land, half a rod wide and about three hundred feet long, belongs to the plaintiffs or to the defendant. This strip lies between two lines, one of which is two rods and the other two and a half rods westerly of the centre line of the defendant's railroad. It was proved that the original location of the railroad at this point, filed by the Boston and New York Central Railroad, the defendant's predecessor, was five rods wide, but it was contended by the plaintiffs that the company abandoned one rod in width of the location, one half a rod on each side of the original location, thus leaving the location which was actually taken and paid for only four rods wide. The issue tried was whether there was such an abandonment, and the only exception taken was to the admission of certain papers in evidence on that issue.

The railroad at this point runs nearly north and south, and it appeared that when the location was filed one William L.

Carlton was the owner of land included in the location lying next easterly of this strip, the boundary line of which, separating it from this strip, was two rods westerly from the centre line of the location. He was also the owner of four other lots southerly of this and adjoining it, through which the location ran, leaving him the owner of the portions of these lots lying on each side of the location. Nearly two years after the location was filed, William L. Carlton having deceased, his administrator filed a petition before the county commissioners asking for an assessment of the damages for the taking of this land, in which he alleged that the land taken "for the building of said railroad and for railroad purposes" along the edge of the first of these lots and through the other four lots was a strip "four rods in width or thereabouts." Upon this petition, on March 9, 1857, the county commissioners awarded damages in the sum of \$15,171.77, describing the land taken as it was described in the petition. The record of these proceedings was admitted without objection. The court then admitted, subject to the defendant's exception, an agreement and a deed referred to in it bearing the same date as the decree of the county commissioners, by which it appeared that the railroad company was to pay to the administrator the above mentioned sum with interest within three years from that date, and was to receive five deeds signed by the heirs of William L. Carlton, which together covered the strip four rods wide through all of these lots, one deed being made for each lot, and these deeds being delivered in escrow with a provision that any deed might be taken by the company on payment of that portion of the money which was mentioned as the price of the land conveyed by it. It was further stipulated that, if the whole amount was not paid with interest within three years, the deeds should be returned to the grantors, and the railroad company should have no right to the land except that derived from its location, and should be liable for payment of the commissioners' award. The records of the commissioners show that the company was required to give security for the payment of the award. The sum mentioned in the agreement was not paid within the time limited therein, and the deed of the lot next easterly of the land in question, which had been delivered in escrow, was never delivered to the railroad company.

This deed described by metes and bounds the strip four rods wide, and to the specific description were added the words "the same being the track or road-bed of said Boston and New York Central Railroad, four rods in width," etc. Under the agreement it is to be inferred that this land was afterwards paid for in accordance with the award of the county commissioners. The facts disclosed by these papers tend strongly to show that of the estate of William L. Carlton the railroad company took and paid for a strip of land only four rods wide next easterly of the land in question and extending southward through the next four lots, and that the remainder of the land included in the original location along that line was abandoned. In *Westcott v. New York & New England Railroad*, 152 Mass. 465, these papers were held competent evidence to prove that fact. But if the company abandoned half a rod in width on each side of the four-rod strip through Carlton's lots next southerly of this land, and on the easterly side of the location through Carlton's lot next easterly of this, it would seem probable that the half-rod on the westerly side along this lot was also abandoned, and that the company's land was not left with a jog extending out half a rod on one side for a short distance along land of a different owner. The language above quoted from the deed which was referred to in the agreement implies that the road was only four rods wide at that point. We are of opinion that the agreement and deed, taken in connection with the record of the county commissioners, were competent for the consideration of the jury with the other facts, as tending to show that the railroad company abandoned this strip of land, as well as a similar strip to the southward, and a corresponding strip on the opposite side of the railroad.

Exceptions overruled.

CITIZENS' GAS LIGHT COMPANY OF READING, SOUTH READING, AND STONEHAM vs. INHABITANTS OF WAKEFIELD.

Middlesex. March 26, 1894. — May 18, 1894.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Purchase of Gas and Electric Light Plants by Town — Schedule of Property — Call for Stockholders' Meeting — Ratification by Stockholders of Acts of Directors — Constitutional Law.

There is nothing in St. 1891, c. 370, indicating that, after a town has voted at two separate town meetings called as required by § 18 that it is expedient to exercise the authority conferred by the statute pursuant to § 3, any additional vote is necessary.

The specific property which a town is required to purchase in accordance with the provisions of St. 1891, c. 370, and the price, time, and other conditions of the sale, are to be determined by the commissioner or commissioners to be appointed under § 18; and if the poles for the support of the wires of an electric light company used in distributing electricity were not legally located, this would not entirely defeat the petition under the statute, and what effect it would have upon the property to be purchased or the price to be paid for it cannot be determined under such petition.

The schedule of property under St. 1891, c. 370, is required for the purpose, not of furnishing such a formal description as may be necessary or proper in a conveyance, but of furnishing such information in detail to a city or town that the parties may intelligently negotiate for the purchase, or, if the parties cannot agree, of furnishing to the commissioners such a bill of particulars as may be necessary or convenient for an intelligent adjudication of the matters which they are to determine.

On a petition by a gas and electric light company to compel a town to purchase its plant, etc., agreeably to the provisions of St. 1891, c. 370, it appeared that a schedule required by the statute was filed by the secretary of the company under the authority of a vote of its directors and that the stockholders at a meeting called to take action upon the proposition to sell, etc., and to transact such other business as should come before the meeting, ratified the action of the directors, but this was more than thirty days after the passage of the final vote by the town that it was expedient to exercise the authority conferred by the statute. It did not appear that there was any change of position on the part of either of the parties between the action of the directors and that of the stockholders, and the petitioner duly filed its petition within sixty days after the filing of the schedule. The town took no action to rescind its votes between the time of filing the schedule and the vote of the stockholders, if such action could have been taken, and the petitioner never attempted to repudiate the action of the directors. *Held*, that the vote of the stockholders must be considered as within the call for the meeting at which it was passed, and that, without considering whether the determination to sell the property and to file the

schedule according to the statute was within the authority of the directors, and assuming that the filing of the schedule within the thirty days was to be treated as a condition precedent to the right of the company to enforce the obligation of a town to purchase its property, the ratification by the stockholders must be taken as equivalent to original authority.

The St. 1891, c. 370, entitled "An Act to enable cities and towns to manufacture and distribute gas and electricity," is constitutional.

FIELD, C. J. This is a petition under St. 1891, c. 370, § 13, and the case comes before us by appeal from an order of a single justice overruling the demurrer of the respondent, and by appeal from a decree of a single justice appointing commissioners to determine what property shall be sold by the petitioner and bought by the respondent, and what the price, time, and other conditions of the sale and delivery shall be. The facts on which the decree is founded are recited in the decree. The petition was filed on October 28, 1892, and all the proceedings were had before the passage of St. 1893, c. 454.

The decree recites "that the petitioner is, and was at the times set forth in the petition, a corporation established under the laws of Massachusetts and having its usual place of business at Wakefield, in the county of Middlesex; that it is, and was at said times, engaged in the business of manufacturing gas for the use of the inhabitants of the towns of Wakefield, Reading, and Stoneham, with its main gas works in Wakefield, and with pipes extending into the towns of Reading and Stoneham; that it was duly authorized by the board of gas commissioners, and by the necessary vote of stockholders, under and in pursuance of chapter 385 of the Acts of 1887, to engage in the business of generating and furnishing electricity for light and power in the towns of Reading, Wakefield, and Stoneham, and is and was at said times engaged in furnishing electric light for commercial purposes to the inhabitants of the town of Wakefield, with its central lighting station in Wakefield."

It is contended that the two votes passed by the town pursuant to St. 1891, c. 370, § 3, to the effect "that it is expedient for the town to exercise the authority conferred upon towns under the provisions of chapter 370 of the Acts of the Year 1891," are not equivalent to a vote that the town decides to establish a plant for the manufacture and distribution of gas and electricity, but that an additional vote to the effect that

the town decides to establish such a plant is required before the town becomes subject to the obligations imposed by the statute. See §§ 12 and 13. But the statute makes provision for only two votes. Section 12 begins as follows: "When any city or town shall decide as hereinbefore provided to establish a plant, and any person, firm, or corporation shall at the time of the first vote required for such decision be engaged," etc. The provisions thereinbefore made are the votes required by § 3, and the first vote must mean the first vote required by that section. Section 13 begins as follows: "Any person, firm, or corporation desiring to enforce the obligation of any city or town under section twelve to purchase any property shall file with the clerk of such city or town, within thirty days after the passage of the final vote whereby such city or town shall have decided to establish a plant, a detailed schedule describing such property and stating the terms of sale proposed," etc. The final vote must be the vote at the last of the two legal town meetings mentioned in § 3. This construction is confirmed by the language in the last clause of § 18. We find nothing in the statute anywhere indicating that, after the town has voted at two separate legal town meetings called as required by § 3 that it is expedient to exercise the authority conferred by the statute pursuant to § 3, any additional vote is necessary, and we think that this contention cannot avail.

Section 12 provides as follows: "When any city or town shall decide as hereinbefore provided to establish a plant, and any person, firm, or corporation shall at the time of the first vote required for such decision be engaged in the business of making, generating, or distributing gas or electricity for sale for lighting purposes in such city or town, such city or town shall, if such person, firm, or corporation shall elect to sell and shall comply with the provisions of this act, purchase of such person, firm, or corporation before establishing a public plant such portion of his, their, or its gas or electric plant and property suitable and used for such business in connection therewith as lies within the limits of such city or town. If in such city or town a single corporation owns or operates both a gas plant and an electric plant, such purchase shall include both of such plants," etc. The petitioner, as the decree recites, operated both a gas plant

and an electric plant in the town of Wakefield. The respondent contends that its poles for the support of the wires used in distributing electricity were not legally located in the town of Wakefield. On this question the decree recites as follows :

" It appeared that an application by petitioner for permission to erect and maintain poles and wires in the streets of Wakefield had been made to the selectmen of Wakefield under the provisions of chapter 382 of the Acts of 1887 (there being another company in said town engaged in or organized for the purpose of doing an electric lighting business), that said permission was refused by said selectmen, but upon appeal taken to the board of gas and electric light commissioners, under the provisions of said act, the decision of the selectmen was reversed, and said permission granted, the order of said board being as follows, viz. :

" " The Board of Gas and Electric Light Commissioners.

' Boston, May 27, 1890.

" " In the matter of the appeal of the Citizens' Gas Light Company of Reading, South Reading, and Stoneham from the decision of the selectmen of Wakefield refusing to grant it permission to erect poles and string wires in the streets of said town, Ordered, that the decision of the selectmen be reversed, and that permission is granted to the Citizens' Gas Light Company of Reading, South Reading, and Stoneham to erect wires over or under the streets, lanes, and highways of the town of Wakefield for the purpose of supplying electricity for light and power.'

" Thereafter, on August 7, 1890, at a regular meeting of said board of selectmen, without petition, notice to parties interested or a public hearing, the following vote was passed, viz. :

" " Voted, that the Citizens' Gas Light Company of Reading, South Reading, and Stoneham be, and is hereby, authorized and empowered to engage in the business of furnishing electricity for light and power in the town of Wakefield, and to erect poles and string wires in the streets and highways of said town, the location of said poles to be hereafter designated, and subject to such restrictions as to quality and style as may be imposed by the selectmen of said town of Wakefield, and subject also to such other provisions and conditions as may be required by said board of selectmen.'

" And a copy of said vote was furnished to the petitioner by

the secretary of the board of selectmen of the town of Wakefield. But, except as aforesaid, the selectmen of the town of Wakefield had not given the petitioner any writing specifying where the posts to be used might be located, the kind of posts, and height at which and the places where the wires might run; and no such specifications had been recorded in the records of the town of Wakefield in accordance with chapter 109, section 3, of the Public Statutes, and of chapter 221 of the Laws of 1883; and except as aforesaid, said petitioner received no written consent from the board of selectmen of said town to erect poles, lay or erect wires over or under the streets, lanes, and highways of said town, or to dig up and open the ground within the streets or highways of said town for the purpose of laying lines of wires or to erect and maintain lines of wires upon or above the surface of the streets and highways of said town as provided in either chapter 382 or 385 of the Acts of 1887, or in compliance with any other statute. As to whether any oral directions or consent regarding said matters were given by the selectmen, no evidence was introduced by either party."

The contention is that so far as the electric plant is concerned every pole supporting the wires within the limits of the highways in the town of Wakefield is a public nuisance, and that the town cannot be compelled to purchase property of the petitioner which the petitioner cannot legally use, and which may be removed or destroyed as a nuisance. The petitioner had received general authority to erect poles and lay wires in the public streets of the town. How far the particular location of the poles and the quality and style of them were subject to the approval of the selectmen of the town need not now be considered. The petitioner actually owned and operated an electric plant in the town. The specific property which the town is required to purchase in accordance with the provisions of the act, and the price, time, and other conditions of the sale, are to be determined by the commissioner or commissioners to be appointed under § 13. If the poles in the public ways were not legally located, this would not entirely defeat the petition, and what effect it would have upon the property to be purchased or the price to be paid for it cannot now be determined.

The respondent contends that the petitioner has not com-

plied with the provisions of the act in filing a detailed schedule of the property within thirty days after the passage of the final vote, as required by § 18. The final vote was on August 15, 1892. The directors of the company, on September 9, 1892, voted that the company file a detailed schedule of its property in accordance with the act, and that the secretary be authorized to sign and file the same; and on September 12 the secretary, in the name of the company, filed with the clerk of the town a statement in detail of its plant, and the price and terms upon which the company would sell its property to the town. The contention is that the schedule should not be a mere list or catalogue of property, but a formal inventory, with a particular description sufficient to enable a court to make a decree for specific performance, or such as would be required in a formal conveyance of the property. The provisions of the statute are, that, if the corporation desires to enforce the obligation of the town to purchase any property, it shall file "a detailed schedule describing such property and stating the terms of sale proposed. If the parties fail to agree as to what shall be sold, or what the terms of sale and delivery in accordance with the provisions of this act shall be," either party may apply to the court, and the court shall appoint a commissioner or commissioners who shall adjudicate "what property, real or personal, including rights and easements, shall be sold by the one and purchased by the other." It is evident that the schedule is not intended to settle finally just what property is to be included in the sale. We think that the schedule was required for the purpose, not of furnishing such a formal description of the property as may be necessary or proper in a conveyance, but of furnishing such information in detail to a city or town as the parties may need intelligently to negotiate for the purchase, or, if the parties cannot agree, of furnishing to the commissioners such a bill of particulars as may be necessary or convenient for an intelligent adjudication of the matters which they are to determine. We cannot say that the schedule filed in this case on its face appears not to be made up in sufficient detail to enable the town to understand what property specifically the petitioner owned and used in its business in the town of Wakefield, and we think that the commissioners probably could identify the property from the schedule, and

intelligently make their adjudication. Certainly it does not appear in the papers before us that the commissioners will be unable to identify the property from the schedule, and from such facts as necessarily must be put in evidence before them.

The schedule was filed by the secretary under the authority of a vote of the directors of the company, and it is contended that it was beyond the power of the directors to determine whether the company would elect to sell its property to the town and avail itself of the provisions of the statute. See Pub. Sts. c. 106, § 23. The by-laws of the company are not set out in the papers. It appears, however, that on September 19, 1892, the stockholders, at a meeting called for the purpose of taking action upon a proposition to sell the plant and assets of the company, and to transact such other business as should come before the meeting, ratified the action of the directors, but this was more than thirty days after the passage of the final vote by the town. We think that the vote of the stockholders must be considered as within the notice or call for the meeting at which it was passed.* It does not appear that there was any change of position on the part of either of the parties between the action of the directors and that of the stockholders, and the petitioner duly filed its petition within sixty days after the filing of the schedule. Without considering whether the determination to sell the property to the town, and to file the schedule in accordance with the provisions of the statute, was within the authority of the directors, and assuming that the filing of the schedule within the thirty days is to be treated as a condition precedent to the right of the company to enforce the obligation of a city or town to purchase its property, we are of opinion that the ratification by the stockholders in this case must be taken as equivalent to original authority. The town took no action to rescind its votes between the time of filing the schedule and the vote of the stockholders, if any such action could have been taken, and the petitioner has never attempted to repudiate the action of the board of directors.

* The respondent contended that the stockholders were not authorized to pass the vote which they did, as the meeting of the stockholders was a special one, called for the purposes set forth in the notice, and there was nothing in that notice informing the stockholders that there would be a motion to ratify the action of the directors.

See *Bolton v. Lambert*, 41 Ch. D. 295; *Andrews v. Aetna Ins. Co.* 92 N. Y. 596; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177; *Dempsey v. Chambers*, 154 Mass. 330.

It is contended that St. 1891, c. 370, is unconstitutional. It is not in violation of the Constitution of Massachusetts for the Legislature to authorize a town to purchase and maintain either a gas or an electric plant for the purpose of furnishing light to its inhabitants. *Opinion of the Justices*, 150 Mass. 592. The Legislature might have authorized cities and towns to erect and maintain such plants without requiring the cities or towns to purchase any existing plant of this kind belonging to private persons or a corporation, but it has not done so. Under this statute a city or town is not required to establish any such plant, and private persons or corporations are not required to sell to any city or town any existing plant. In this respect, there is nothing compulsory in the statute. But if a town chooses to act under the statute, it must act in accordance with its provisions and take the burdens with the benefits. The statute does not provide for a trial by jury upon the value of the property purchased, or upon any of the terms of the purchase. If we assume that, when property is taken by a town for a public use, the owner of the property has a right to a jury trial upon the amount of the reasonable compensation to be paid, still Article XV. of the Declaration of Rights has no application to a party who comes in voluntarily under the provisions of a statute which provides for the determination of his rights and obligations in another manner than by a jury trial.

Decree affirmed.

S. K. Hamilton, for the respondent.

E. R. Champlin & C. R. Darling, for the petitioner.

EDWARD L. COLLINS vs. JOHN C. KENNEDY.

Suffolk. March 26, 1894. — May 18, 1894.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Poor Debtor — Jurisdiction — District Court — Prohibition.

The St. 1893, c. 396, was not intended to affect the jurisdiction of district and police courts in proceedings for the relief of poor debtors; and a writ of prohibition will not issue to restrain the justice of a police court from examining a debtor arrested on execution, who has made application to him for a notice of his desire to take the oath for the relief of poor debtors, on the ground that the certificate authorizing his arrest and under which he had entered into a recognizance was issued by a district court of the same county within the judicial district of which neither the debtor nor creditor lived or had their usual place of business.

FIELD, C. J. This is a petition for a writ of prohibition to restrain the respondent, as a justice of the police court of the city of Newton, from proceeding to examine the petitioner, a debtor arrested on an execution issued against him by the Superior Court of the County of Suffolk, at the suit of Lester H. Latham, who is described as of Boston, in said County of Suffolk. The petitioner is described in the execution, and describes himself in his petition, as of Newton, in the County of Middlesex. Latham, the judgment creditor, made application to the First District Court of Eastern Middlesex for a certificate authorizing the arrest of Collins upon the first charge specified in Pub. Sts. c. 162, § 17, and that court issued a notice to Collins, pursuant to § 18 of said chapter, which was duly served upon him. Collins failed to appear, and was defaulted, and a certificate authorizing his arrest was duly issued and annexed to the execution upon which Collins was arrested, and he duly entered into a recognizance in the usual form to deliver himself for examination within thirty days from the date of his arrest. Within said thirty days Collins appeared before the police court of the city of Newton, and made application for notice of his desire to take the oath for the relief of poor debtors, and to have a time and place appointed for his examination. A time and place were appointed, and a notice to the creditor duly issued and served,

and both creditor and debtor duly appeared. The debtor then contended that the First District Court of Eastern Middlesex had no jurisdiction to issue the certificate of arrest, and that he should be discharged without examination, but the presiding justice of the police court of Newton refused to discharge him on this ground, and proceeded to examine him concerning his property; whereupon he brought this petition. See Pub. Sts. c. 162, §§ 17, 18, 20, 27, 28, 31, 34; St. 1887, c. 442; St. 1888, c. 419; St. 1889, c. 415; St. 1891, cc. 271, 407.

The petitioner concedes that until the passage of St. 1893, c. 396, the First District Court of Eastern Middlesex had jurisdiction in such a case as this to issue the notice and certificate it issued, but he contends that this jurisdiction was taken away by that statute. He contends that the proceedings for the arrest and discharge of a debtor arrested on execution are in the nature of a civil action within the meaning of St. 1893, c. 396, § 13, and that, as neither of the parties to the execution lived or had his usual place of business in the judicial district of the First District Court of Eastern Middlesex, the proceedings could not be instituted in that court. We are of opinion that this contention is not well founded. The civil actions mentioned in § 13 are, we think, the actions of which the district and police courts are given original jurisdiction by § 12. This statute was not intended to affect the jurisdiction of these courts in proceedings for the relief of poor debtors. The petition, therefore, should be dismissed, and it is unnecessary to consider the other objections of the respondent.

If St. 1894, c. 184, should be regarded as applicable to pending proceedings, upon which we express no opinion, the police court of the city of Newton is the court in whose district the debtor lives, and the jurisdiction of this court would not be affected by this statute.

Petition dismissed.

W. M. Noble, for the petitioner.

S. H. Tyng, for the respondent.

COMMONWEALTH vs. JAMES WILLIAMS.

Suffolk. March 26, 1894. — May 18, 1894.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Larceny — Variance — Evidence.

An indictment for larceny alleged that the owner of the stolen property was Preston O. S., and there was evidence that he was as well known by that name as by the name of O. Preston S. *Held*, that it could not be said, as matter of law, that there was a variance.

At the trial of an indictment for larceny the owner of the stolen property testified that on September 12, while in a railroad station in Boston, he was jostled or pushed against by some unknown person, and immediately thereafter discovered that his watch, chain, and charm were gone, and that a few days later he went to a collateral loan office in Boston and found the watch he had lost, which a clerk in the office testified that the defendant had pawned there on September 14. *Held*, that there was evidence that the watch, chain, and charm had been stolen, and that the defendant was the thief.

INDICTMENT for the larceny of a watch, chain, and charm, alleged to be the property of Preston O. Sweet.

At the trial in the Superior Court, before *Lilley, J.*, there was evidence tending to show that the name of the owner of the property was O. Preston Sweet, but that he was also known as Preston O. Sweet, and that he was as well known by the name of Preston O. Sweet as by the name of O. Preston Sweet.

Sweet testified that on September 12, 1891, while he was in the Boston and Albany Railroad station in Boston, he was jostled or pushed against, and immediately afterward discovered that his watch, which had been in his vest pocket and fastened by a chain, was gone, together with the chain and a charm suspended from it; that he did not know who jostled him or took his watch; that ten days later, in consequence of information which he had received, he went to the Collateral Loan Office in Boston, and there found his watch. One Barnes, a clerk in the loan office, testified, that on September 14, 1891, the defendant brought a gold watch to that office to pawn, and this watch was identified by Sweet as the one he had lost.

The defendant requested the judge to rule, 1st, that, by reason of the failure of the government to prove the name of the owner

of the property as laid, there was a variance, and the defendant should be acquitted; and 2dly, that there was no evidence on which the jury could convict the defendant.

The judge declined so to rule, and submitted the case to the jury, who returned a verdict of guilty; and the defendant alleged exceptions.

C. P. Sullivan & J. M. Sullivan, for the defendant.

M. J. Sughrue, Second Assistant District Attorney, for the Commonwealth.

FIELD, C. J. There was evidence that the owner of the property described as stolen was "as well known by the name of Preston O. Sweet as by the name of O. Preston Sweet." The court could not therefore rule, as matter of law, that there was a variance. *Commonwealth v. O'Hearn*, 132 Mass. 553. *Commonwealth v. Gormley*, 133 Mass. 580. *Commonwealth v. Caponi*, 155 Mass. 534. *Commonwealth v. Gould*, 158 Mass. 499. There was evidence for the jury that the watch, chain, and charm had been stolen, and that the defendant was the thief. *Commonwealth v. Deegan*, 138 Mass. 182.

Exceptions overruled.

RICHARD W. HALE & another vs. CHESHIRE RAILROAD
COMPANY & another.

Suffolk. January 22, 1894. — May 21, 1894.

Present: ALLEN, HOLMES, MORTON, & BARKER, JJ.

Consolidation of Railroad Companies — Rights of Dissenting Stockholder.

Where the consolidation of two railroad companies has been authorized by legislative authority, a dissenting stockholder cannot maintain a claim for better terms than those given by the vote of consolidation, if such vote was by a majority of the stockholders of each company acting in good faith and within such legislative authority.

The provisions of Pub. Sts. c. 105, §§ 41, 42, as to the ordinary liquidation or winding up of the affairs of a corporation, do not apply to the consolidation of two railroad companies under legislative sanction.

BILL IN EQUITY, filed December 8, 1891, by two holders of shares of the common stock of the Cheshire Railroad Company,

against that company and the Fitchburg Railroad Company, to obtain better terms than those given by the vote of consolidation agreeably to the provisions of St. 1887, c. 389, and of c. 257 of the Laws of New Hampshire of the same year.

The Cheshire Railroad Company demurred to the bill for want of equity, and because the plaintiffs had not stated any facts entitling them to an account, or sufficient to show that they had any interest in the disposition of the assets, funds, and property of the Cheshire Railroad Company, or that they were entitled to any further compensation or relief than were provided for them in the agreement of consolidation. The Fitchburg Railroad Company assigned the same causes of demurrer, with the additional cause that the plaintiffs had not stated any facts entitling them to any relief from the Fitchburg Railroad Company, or showing that that company had any assets or property in its possession in which the plaintiffs had any interest.

Hearing before *Mason*, C. J., who sustained the demurrers, and the plaintiffs appealed to this court. The material facts appear in the opinion.

G. S. Hale, for the plaintiffs.

G. A. Torrey, for the defendants.

ALLEN, J. By virtue of Pub. Sts. c. 105, § 3, and earlier statutes, the charter of the Cheshire Railroad Company was subject to amendment, alteration, or repeal at the pleasure of the General Court. Each of the two plaintiffs became the owner of a single share of the common stock subject to this liability of alteration. By St. 1887, c. 389, § 2, the railroad company was authorized to unite and consolidate with the Fitchburg Railroad Company on such terms and conditions as should be approved by a majority in interest of the stockholders of each corporation. Each corporation had common stock and preferred stock. A consolidation was made on the terms, in part, that each holder of four preferred shares in the Cheshire Railroad Company should receive five preferred shares in the new company, and each holder of two shares of common stock should receive one preferred share in the new company. This consolidation was duly voted, and approved by a majority in interest of the stockholders of each corporation.

The plaintiffs now contend that they are not bound by these

terms, and that they are entitled to receive the same as preferred shareholders receive, or, if the agreement of consolidation does not allow this, then that they are entitled to go behind the agreement and have their share of the assets of the Cheshire Railroad Company as upon an ordinary liquidation of its affairs, and to have an accounting accordingly.

We do not take this view of the rights of the plaintiffs. Dissenting stockholders are bound by the vote of the majority, acting in good faith and within legislative sanction. It was within the constitutional power of the Legislature to authorize the consolidation. If the plaintiffs had any ground for complaint as to the terms of the plan of consolidation, they should have tried to prevent its going into effect. They virtually concede, however, that the Legislature might sanction a consolidation which should go into effect against their protest. Since the consolidation has gone into effect, they cannot now maintain a claim for better terms to themselves than have been voted. *Durfee v. Old Colony & Fall River Railroad*, 5 Allen, 230. *Agricultural Branch Railroad v. Winchester*, 13 Allen, 29. *Nugent v. The Supervisors*, 19 Wall. 241. *Pennsylvania Railroad v. Miller*, 132 U. S. 75, 88. *Bishop v. Brainerd*, 28 Conn. 289. *Sparrow v. Evansville & Crawfordsville Railroad*, 7 Ind. 369. *Bish v. Johnson*, 21 Ind. 299.

The plaintiffs contend that, under Pub. Sts. c. 105, §§ 41, 42, common and preferred stockholders should stand on the same footing. That is true in case of an ordinary liquidation or winding up of the affairs of a corporation, if there is nothing in its charter or articles to show otherwise; but the rule is not applicable to a case of consolidation like the present.

Decree sustaining demurrer affirmed.

HENRIETTA S. WILEY vs. STEPHEN P. WILEY.

Middlesex. March 7, 1894. — May 21, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Vacating Decrees and Dismissing Libel for Divorce — Discretion of Presiding Justice as to Admission of Evidence.

On a petition praying that a decree absolute and a decree *nisi* in a libel for divorce might be vacated, and that the libel might be dismissed, and for other relief, the court could properly, in the same proceeding, not only vacate the decrees, but dismiss the libel. At the hearing the respondent offered to show that he was never lawfully married to the petitioner, and that the libel should be dismissed on this ground. *Held*, that, as there were other grounds on which the libel must be dismissed, it was in the discretion of the court whether it would or would not hear the evidence offered.

When there are several grounds on which a libel for divorce may be dismissed on the merits, the libellant has not necessarily, as matter of strict law, the right to select for the court the particular ground on which it must act, and to have this incorporated in the decree.

PETITION, filed October 20, 1892, alleging that the respondent was the libellant in a libel for divorce, filed February 12, 1891; that a decree *nisi* was granted therein against the petitioner, and in favor of the respondent, on February 12, 1892; that on April 20 next following, the respondent, well knowing he could not legally marry again, was married to one Annie Rooney, each using an assumed name; that the respondent subsequently, viz. on August 19, 1892, applied for and obtained a decree absolute in said cause, fraudulently concealing the fact of his marriage to Rooney from the court; and praying that both the decree absolute and the decree *nisi* might be revoked and set aside, the libel dismissed, and for other relief.

By an amendment filed November 15, 1892, the petitioner further alleged that in March, 1891, she and the respondent resumed cohabitation, and continued to live together as husband and wife until October, 1891; that she supposed the suit for divorce was ended, and did not know it was to be tried or that it had been tried; that the charges contained in the libel were false, and had been condoned if true; and that the concealment

of the fact of cohabitation was a fraud upon the court, and that the decree *nisi* was obtained by fraud.

The answer of the respondent denied all the allegations of the petitioner.

At the trial in the Superior Court, before *Dunbar, J.*, the petitioner introduced the record in the divorce cause, showing that the libel was filed February 12, 1891, served personally on the libellee on February 14, 1891, and that the decree *nisi* and the decree absolute had been granted as alleged, and introduced evidence tending to show that two or three weeks after the service of the libel on her she met the respondent and went with him to the office of his counsel in the divorce suit, and that he in her presence told the counsel that he had "taken his wife back" and did not want the divorce suit carried on any further; that she then went to live with the respondent, and cohabited with him until the next October; that she then left him because of what she learned about him, and because of his treatment of her; that she went to Vermont on March 21, 1892, and remained there till October 29, 1892; that she had no notice that the divorce suit was to be tried, and did not know she had been defaulted therein until June, July, or August, 1892, when she received a letter stating that a decree *nisi* had been granted in the divorce case, and that the respondent had married the Rooney woman, and subsequently she wrote to her attorney requesting him to take proceedings to set aside said decree; and that the respondent, about June, 1892, on being asked if he had seen the petitioner lately, had replied, "No, I've got rid of her," and that he had "got a divorce on the sly."

The respondent admitted that he was married on April 20, 1892, under the name of Perkins S. Wiley, to Rooney, who used the name Mary Corey.

The respondent introduced evidence tending to show that no such conversation as the petitioner claimed ever took place in the office of his counsel; that he never cohabited with the petitioner after the libel was filed, and denied that he ever said he had "got a divorce on the sly." The counsel of the respondent in the divorce suit testified that he had heard that the respondent was married to Rooney before he applied to have the decree *nisi* made absolute.

The respondent offered evidence to show that he was married to one Lydia L. Wylie about 1850, and that she was still living, and that she had never been divorced. The petitioner objected to this evidence, and the judge excluded it; and the respondent excepted.

The judge ordered the decree absolute and the decree *nisi* to be vacated and annulled, and that the libel be dismissed. The respondent alleged exceptions.

C. Cowley, for the respondent.

B. D. O'Connell, for the petitioner, was not called upon.

FIELD, C. J. The petition in this cause prayed that the decree absolute and the decree *nisi* in the libel for divorce might be vacated, and that the libel might be dismissed, and for other relief. If these decrees were vacated, the libel would stand for further proceedings; but as the evidence, if believed, on which the decrees were vacated also showed that the libel must be dismissed, and as both parties were present and were heard, the court could properly, in the same proceeding, not only vacate the decrees, but dismiss the libel.

The respondent in this petition offered evidence to show that when he was married to the petitioner he had a wife still living, from whom he had never been divorced. This was offered to show that he was never lawfully married to the petitioner, and that therefore the libel should be dismissed on this ground. As there were other grounds on which the libel must be dismissed, it was in the discretion of the court whether it would or would not hear the evidence offered. When there are several grounds on which a libel for divorce may be dismissed on the merits, the libellant has not necessarily, as matter of strict law, the right to select for the court the particular ground on which it must act, and to have this incorporated in the decree.

Exceptions overruled.

WILLIAM S. KING vs. WILLIAM FAIST & others.

Suffolk. March 13, 1894. — May 28, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Sale — Breach of Contract — Pleading — Evidence — Rescission.

If a memorandum in writing is declared on as a written contract of sale, the vendee cannot maintain an action for its breach if he has not himself complied with its terms.

Proof that a written memorandum of an oral bargain does not correctly state the terms of the oral bargain will defeat an action in which the memorandum is declared on as a written contract.

No action lies upon a written contract made and delivered as a contract superseding a previous oral bargain, if the written contract has been itself superseded by the substitution of a different contract.

A person cannot, in order to show that he has a cause of action for the breach of a certain contract, prove a provision of a later and substituted contract, by which the time limited for the performance of his part of the original contract has been extended, unless he avers this provision of the new contract in his declaration, and if he declares only on the original contract he cannot rely as a cause of action upon a breach of the new agreement, as in such a case there would be a variance between the allegation and the proof.

In an action for a breach of contract where the plaintiff declares upon a contract which at the trial is found to have been superseded and modified by a later one, he cannot by an amendment of the declaration recover upon the later contract if it appears that, before the defendant was in default under the later one or had notified him of an intention not to perform it, he himself repudiated it by notifying the defendant that he would not perform it on his part, thus giving the defendant the right to rescind the contract.

By the terms of a contract for the sale and delivery of a quantity of flour, the vendor was to ship the flour specified as the vendee might direct, drawing upon him demand drafts for the flour shipped, and the vendee was to take out the flour by a certain date and to honor the drafts. A month before the time limited for withdrawing the flour the vendee wrote to the vendor, "Before we pay any more drafts we want some assurance from you that you will make good any claims on account of quality," and stated orally to the agent of the vendor that he would pay no future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality, and he returned a draft of the vendor unpaid. The vendor thereupon wrote, "We are not going to send any more flour." *Held*, that the vendor had a right to rescind the contract, the vendee having, without justification, declared his intention not to perform it; and that the letter of the vendor was an effectual rescission, and relieved him thereafter from all obligation under the contract to deliver the flour.

CONTRACT, for the failure to sell and deliver one thousand barrels of flour. Writ dated June 24, 1892.

Trial in the Superior Court, without a jury, before *Maynard, J.*, who ruled that the action could be maintained and found for the plaintiff; and the defendants alleged exceptions. The material facts appear in the opinion.

W. M. Stockbridge, (*F. J. Hutchinson* with him,) for the defendants.

S. L. Powers, (*R. A. Sears* with him,) for the plaintiff.

BARKER, J. The plaintiff was a flour merchant, doing business in Boston under the name of W. S. King and Company, and the defendants were manufacturers of flour at Milwaukee, selling it in Boston through their agent, one Bronson. The plaintiff and Bronson were members of the Boston Chamber of Commerce, and their dealings were made under the usages and rules of the Chamber, according to which, on sales of flour for shipment from a mill, the purchaser's reasonable time for ordering the mill to ship, or for "ordering out" the flour, was fourteen days from the date of purchase; and shipment in fourteen days after receipt of directions at the mill constituted "prompt shipment," and in seven days, "immediate shipment."

Before February 27, 1890, the plaintiff had made purchases from the defendants, as to the last of which there was then pending a dispute, the plaintiff claiming damages for the poor quality of some flour delivered on a contract for two thousand barrels, of which two car-loads, three hundred barrels, had not yet come forward. On February 27 the plaintiff and Bronson made an oral agreement for the settlement of the dispute, and for a further purchase and sale of flour, by which the defendants sold to the plaintiff one thousand barrels of their La Rose patent flour at \$4.65 per barrel, delivered at Boston points, the quality to be of standard grade fully equal to any ever received by him from them, and to be "ordered out" by him within a reasonable time and in such lots of one or more car-loads as he might require, the sale to be in full settlement of the dispute also, and the terms of payment to be either demand drafts with bills of lading "to order," meaning, as we infer from the statement of the case in the plaintiff's brief and a letter of February 28, drafts which the plaintiff should not be called upon to honor until he accepted the flour on which they were drawn; or drafts payable on examination or arrival of the flour, Bronson's decision on its inspection and test to be final: or demand drafts

for twenty-five cents per barrel less than the agreed price, the margin to be remitted as fast as each load should be received and found satisfactory; the defendants to adopt that one of the three methods which they preferred, but to select one of them, and Bronson to report to the plaintiff the method selected. A written instrument, intended by the plaintiff and Bronson to be a memorandum of this verbal agreement, was made on the same day, and was signed by Bronson and delivered by him to the plaintiff. It is in the form of a letter from Bronson to the plaintiff, beginning with the statement, "I have this day sold you for account Faist, Kraus, & Co.," and contains the terms of the oral bargain, except that the third option as to the mode of drawing against shipments was omitted from the memorandum by mistake. This instrument is set out by copy as part of the plaintiff's declaration, and his action is founded upon it as a written contract between himself and the defendants for the sale and delivery to him of one thousand barrels of flour, which he alleges that he within a reasonable time after the making of the contract ordered them to ship, and which they have, without valid reason or excuse, refused and neglected to deliver. The answer does not set up the statute of frauds, but denies the plaintiff's allegations, and alleges that after the contract was made the plaintiff notified them that he renounced and would not perform the same, and that they thereupon rescinded the contract and notified him that they would not perform its obligations.

Bronson, having on February 27 wired the defendants that he had sold the plaintiff one thousand barrels at \$4.65, wrote them on the next day stating the terms of the oral bargain, and adding that, as soon as they should say which method of drawing the defendants would follow, instructions for the two car-loads not yet sent under the old contract would go forward, and instructions for the one thousand barrels would follow in due course. On March 3, the defendants in reply to this letter wrote Bronson: "Now about King's 1,000 barrels. We can't recognize any claim from W. S. King & Co., and your limit was \$4.75. Will fill the order under the following conditions, which you may accept or not. No commission and leaving no margin of 25 cents per barrel, but mail you to-day

sample of our last run of patent, taken from a barrel of which we have about 1,200 barrels piled up in our warehouse, which if accept, will keep for Messrs. King & Co., provided the flour suits them. We guarantee flour all up to this sample, but won't guarantee the way you say in your favor, as any ever sent. . . . Terms the same as before, and demand draft. $\frac{1}{2}\%$ off, and flour has to be taken out inside of six weeks, or to name a day, say up to April 15th. Please see King about this, and, if he is willing to accept our conditions, will ship the flour." On receipt of this letter, Bronson showed it to the plaintiff, who at first insisted upon the terms of the oral agreement, but finally assented to the terms proposed. About March 15 a car-load of flour sent under the contract for two thousand barrels arrived at Boston and was inspected for the plaintiff by an inspector, who brought him what purported to be a sample, of poor quality. At this time the final car-load under the same contract had been shipped from the mill to Fitchburg, and, as the plaintiff was informed, on the same day with the Boston car-load. He had paid for the latter, and, assuming that it was of poor quality, on March 15 he wrote to the defendants: "We have your invoice for the Lowell car, but before we pay any more drafts we want some assurance from you that you will make good any claims on account of quality. The last car in here is, we think, very poor flour, very short and soft. We sent for sample at Beverly just in. This is very good body, and must have been made from very different stock. We find the Fitchburg car was shipped same day as Boston, so we expect trouble there, and have sent for sample. We want 1,000 bbls. of good flour on our recent purchase, and must have good flour. Shall we express a sample of this car to you?" The draft for the car-load then in transit to Fitchburg arrived in Boston on March 16 or 17; and thereupon the plaintiff asked Bronson to give his personal guaranty to protect him in case he paid the draft and the Fitchburg car-load should be found deficient in quality. This Bronson refused to give, and on March 17 the plaintiff refused to pay the draft, and also told Bronson that he would not pay any future drafts without some guaranty to protect him in case the flour should on arrival prove deficient in quality; and the defendants, upon learning that the plaintiff

had refused to pay the draft, diverted the Fitchburg car-load, and it has never been delivered to the plaintiff. On March 18 the plaintiff wrote the defendants a letter in which, after stating that he had received a sample from the Fitchburg car "not poor enough to make any claim on," he adds: "We declined to pay your draft yesterday, because your agent, Mr. Bronson, refused to protect us on the quality of this flour if it was not right. We are rather surprised that we have not had any reply from Mr. Bronson in regard to this car to Boston. If you will kindly send us some guarantee that you will make right what flour you ship us that is not right, and let us know what proof you require, we would like to have you do so. Our Mr. King will be away for the balance of the week, and on his return we will want to order out probably a large part of the last 1,000 barrels, and wish to have something definite in regard to it during the week. If you wish for a sample of the car of flour here, which in our judgment is way off, Mr. Bronson can have samples drawn from this car any time. It still remains unsold, and we await your advice as to disposal." On March 22, the defendants acknowledged the receipt of the letters of March 15 and 18, adding: "Regarding the quality of late shipments, will say the car-load to Fitchburg and the one we forwarded the same date to Boston must have been the same flour, because it was made on the same run and taken from one pile in the warehouse, and fully as good as any previous shipments. Was more than astonished to learn that you let our draft go back unpaid. To avoid this in future, you must name us some good standing bank who guarantee us the payment of your drafts, before we can ship any more flour to you." On March 25, the plaintiff replied by a letter in which, after stating that he will forward samples of the Boston, Beverly, and Fitchburg car-loads, and suggesting that the Boston car-load was of export grade sent by the defendants' mistake, he adds: "We will give you the name of a bank if you wish and will so ship, who will guarantee payment of your drafts on arrival and examination of flour; but we cannot pay more drafts without some guarantee as to quality, especially when you are so positive that the flour is the same, when it is so easy to see that it is not. We may not be able to send the samples to-night, but will to-morrow; and we

trust, when you see them and give them your attention, you will acknowledge that it is as we have written about, make it good, and ship us good flour on our last purchase of 1,000 barrels; would like to order some out at once, but would like to get this matter adjusted first, and think when you see the samples you will acknowledge promptly and be ready to ship and give us certainty as to quality before making us pay in full for the flour." To this letter the defendants replied on March 29: "Your favor March 25th at hand and fully noted. In reply will say you returned our draft unpaid, which cancels all other contracts. We are not going to send any more flour." In the mean time the plaintiff had discovered that the flour shown him as a sample of the Boston car-load was not such a sample, and that the car-load was not deficient in quality, and on March 28 wrote to the defendants to that effect, and asked them to send a draft and bill of lading for that car-load. This letter was received by the defendants on March 31, and they never complied with the request made. The correspondence rested here until April 12. The price of flour in the Boston market commenced to rise in the early part of March, and continued to increase until the latter part of May. On April 12 the plaintiff wrote Bronson asking to have the one thousand barrels shipped, adding: "Directions for above were to be given before April 15th. Would like immediate shipment. If your shippers wish drafts guaranteed, I will attend to this, but it was no part of the contract." On April 21 the plaintiff wrote to the defendants asserting that, on the receipt of their letter of March 29, he had told their agent Bronson that he should insist on the fulfilment of the contract, adding: "And we now beg to say that we must insist on the shipment of the flour, and hereby demand shipment of same within fourteen (14) days from the time you received our shipping instructions, or by April 29th. The returning of the draft on former purchases has, as we understand it, nothing to do with this purchase, the terms of which we have always been ready to comply with. We beg to hand you copy of our contract; and we think your letters and telegrams to your agent fully confirm same." The copy referred to, we infer, was a copy of the memorandum of February 27, declared on by the plaintiff. To this letter the

defendants, on April 23, replied: "Your favor April 21st at hand and noted. In reply can only repeat what we wrote to you, March 29th, that we are not going to send you the flour." The flour was never sent, and the suit was commenced some two years after this final refusal.

The case was tried by the court without a jury, and the defendants, among other requests for rulings, all of which were refused, asked the court to rule that the plaintiff could not maintain the action on the pleadings. In our opinion the court should have so ruled. Treating the memorandum of February 27 as a written contract of sale under the usage, fourteen days from the date of purchase was the reasonable time within which the plaintiff must order the flour out, and he did not give the order within that period. Again, the writing was not made and delivered as a contract, but as a memorandum of an oral bargain. The pleadings raised the issue whether it was a written contract made by the defendants and delivered to the plaintiff as a contract, and upon the pleadings he was not entitled to recover upon proof that it was made and delivered as a memorandum of an oral bargain which it did not correctly state. Again, if the court found that the instrument of February 27 was made and delivered as a contract, superseding the oral bargain and conclusive as to the stipulations of the parties, the facts required a further finding that, upon the proposal of different terms by the defendants and the oral assent of the plaintiff to the new terms, the first contract was superseded and another substituted for it; and as the substituted contract was not declared on, the plaintiff could not maintain his action on the pleadings. The terms offered in the letter of March 3 are so different from those of February 27 that the only proper inference from all the facts is, that, after the plaintiff's assent to the offer of March 3, the contract so made was the only contract between the parties. That contract was for one thousand barrels of a certain lot of twelve hundred barrels of flour then piled up in the defendants' warehouse, of their then last run of patent flour, and which they were to keep for the plaintiff, if he accepted, and which they guaranteed was all up to a sample mailed on the same day, the flour to be paid for by demand drafts, one half of one per cent off, and the flour to be taken out by April 15.

The plaintiff contends that it is not clear that the terms of February 27 were declined by the defendants, and that the real situation is, that a modification of an original contract had been suggested by the defendants, and effected by his assent to the offer stated in their letter of March 3; and that he might declare upon the instrument of February 27 as a written contract, and under his declaration offer proof of the subsequent modification. The question of pleading here raised has not been discussed in our decisions which have dealt with the doctrine that the terms of a written contract may be varied by a subsequent oral agreement. See *Cummings v. Arnold*, 3 Met. 486; *Loring v. Alden*, 3 Met. 576; *Stearns v. Hall*, 9 Cush. 31; *Blasdel v. Souther*, 6 Gray, 149; *Kennebec Co. v. Augusta Ins. & Banking Co.* 6 Gray, 204; *Palmer v. Stockwell*, 9 Gray, 237; *Rockwood v. Wolcott*, 3 Allen, 458; *Lerned v. Wannemacher*, 9 Allen, 412; *Whittier v. Dana*, 10 Allen, 326; *Stults v. Newhall*, 118 Mass. 98; *Ballou v. Billings*, 136 Mass. 307; *Emery v. Boston Ins. Co.* 138 Mass. 398; *Rogers v. Rogers*, 139 Mass. 440; *Hastings v. Lovejoy*, 140 Mass. 261. Our statute is, that the declaration must state the substantial facts necessary to constitute the cause of action. Pub. Sts. c. 167, § 2, cl. 3. This is consistent with the old rule of pleading, that matters which should come more properly from the other side need not be stated, it being enough for each party to make out his own case. Com. Dig. Pleader, c. 81. 1 Chit. Pl. (14th Am. ed.) 222. If the plaintiff's case could stand solely on the instrument of February 27 as a written contract of the defendants which they had refused or failed to perform, and he was not compelled in order to show his own right of action to rely upon a subsequent modification of its terms, and so could treat the new agreement merely as a defence which must fail because it had not been performed by the defendants, (see *Whittier v. Dana*, *ubi supra*,) and was not substituted for the original, (see *Stults v. Newhall* and *Rogers v. Rogers*, *ubi supra*,) it would not be necessary for him to state in his declaration either the subsequent agreement or its breach; for neither of those facts is in that case a necessary constituent of his cause of action; and if the defendants should prove the subsequent agreement as a defence, the plaintiff could rebut that defence by proof that the new agreement was not in substitution, and that it had not

been performed, although there was no such averment in his declaration. But to show that he has a cause of action, he must prove a term of the new contract, namely, that he had until April 15 to order out the flour, and he cannot do so without having averred this necessary substantive fact in his declaration. And if he relies as a cause of action upon the defendants' breach of the new agreement, he cannot prove the new agreement if he has alleged only the original contract, as there would be a variance between his allegation and his proof.

The plaintiff contends that, even if his only right to maintain the action is upon the substituted contract, the facts upon which the controversy must ultimately be decided are now before the court, and that a new trial should be denied, and he should have judgment on the finding, upon amending his declaration. But upon the facts now before us he cannot maintain an action for the failure to deliver the one thousand barrels of flour. Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract. *Ballou v. Billings*, 136 Mass. 307. His conduct justified them in rescinding, and they made an effectual rescission.

Upon the plaintiff's assent to the terms proposed in the letter of March 3, the acts required to perform the contract were these. The defendants were to keep for him one thousand of the twelve hundred barrels of flour specified, and to ship it as he might direct, in car-loads, drawing upon him demand drafts at the rate of \$4.65 per barrel so shipped, one half of one per cent off. The plaintiff was to take out the flour by April 15, and to honor the drafts. The first act of either party bearing on the question of a breach or rescission of the contract was the statement in the plaintiff's letter to the defendants of March 15: "Before we pay any more drafts, we want some assurance from you that you will make good any claims on account of quality." Even if there was a possibility that more drafts would be drawn under the contract then partially performed, so that these words would refer in part to such drafts, the words must be taken to refer also to the drafts contemplated by the terms of the contract for the one thousand barrels, of which the letter

also says, "We want 1,000 bbls. of good flour on our recent purchase, and must have good flour." The next steps were the plaintiff's oral statement on March 17 to the defendants' agent, Bronson, that he would not pay any future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality, and the plaintiff's letter of March 18, which, if it did not explicitly require the defendants to send some guaranty of future shipments, did so impliedly by its language referring to the one thousand barrels and its failure to withdraw the declaration of the previous letter. In the mean time the defendants, if performing their part of the contract, had been keeping for the plaintiff since March 3 the one thousand barrels of flour, while the market rose. They had a right to treat the plaintiff's letters of March 15 and 18, and his statements of March 17 to Bronson, as declarations that he would not perform the contract as made and then subsisting, and to rescind the contract; and they in effect did this, by their letter of March 22, in which they say of his failure to pay a draft, "To avoid this in future you must name us some good standing bank who guarantee us the payment of your drafts, before we can ship any more flour to you." In reply, on March 25, the plaintiff wrote a counter proposition to give the name of a bank who would guarantee drafts if the defendants would so ship that the drafts should be payable on arrival and examination of flour, and reiterated his statement, "We cannot pay any more drafts without some guarantee as to quality." Upon the receipt of this letter the defendants wrote unconditionally, "We are not going to send any more flour." It is true that they stated also in the same letter, "You returned our draft unpaid, which cancels all other contracts," a statement which, considered as a proposition of law, was no doubt erroneous; but they do not make that statement in such a way as to confine themselves to it as their only justification for refusing to send more flour. See *Wright's case*, L. R. 7 Ch. 55.

In our opinion they had the right on March 29 to rescind the contract, because the plaintiff had without justification stated to them, and had more than once repeated, his intention not to perform it; and the letter of March 29 was an effectual rescission, and thereafter they were relieved from all obligations to deliver the flour.

Exceptions sustained.

EDWIN W. MARSH & another, trustees, vs. EMELINE T. HOYT
& others.

Suffolk. March 22, 1894. — May 28, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Devise in Trust — Vested Remainder.

After giving to his wife his household goods, etc., a testator gave the residue of his property to trustees to pay to his wife the net income for life, after her decease an annuity for life to her niece, and as soon as might be after his wife's decease certain money legacies, one of which of ten thousand dollars was on a condition, and immediately after his wife's decease to set apart a trust fund of five thousand dollars for one of his nephews. The sixth clause of the will gave two third parts of the residue to two of the trustees as their own, and the seventh clause was as follows: "It is my will that said surviving trustees, from and after the decease of my said wife, (subject to the payment of said annuity and legacies,) continue to hold in trust the other undivided third part of said rest and residue of my said property and estate, including the amount of said legacy of ten thousand dollars, should the same be forfeited for non-compliance with the condition thereto annexed, and also including any unexpended portion of said trust fund of five thousand dollars, but in trust, nevertheless, to be held, managed, and invested by them with a view to safety and profit, and the net income thereof paid semiannually to my niece A. for and during her life; and, to take effect at her decease, I give, bequeath, and devise said third part to her children, in equal shares, to them, their heirs, executors, administrators, and assigns forever." At the time of the making of the will and at the death of the testator A. had four children, three of whom were living at the time of A.'s decease, one having died previously never having had any children. Held, that a right to one fourth of the trust estate vested in each of the children at the testator's decease, and that the share of the deceased child, so far as real estate being less than five thousand dollars in value, passed to her husband under Pub. Sts. c. 124, § 1, and, so far as personal property, was to be paid over to her administrator to be disposed of according to law as assets of her estate.

BARKER, J. After giving to his wife his household goods, personal effects, and other articles of like nature, the testator gave the rest of his property to trustees, to pay the net income to his wife during her life. From and after her decease they were to pay her niece an annuity for life, and as soon as might be after his wife's decease they were also to pay certain money legacies, one of which, of ten thousand dollars, was upon a condition, and immediately after his wife's decease to set apart a trust fund of five thousand dollars for one of his nephews. The sixth clause of the will gave two third parts of the rest and residue of the property to two of the trustees as their own, and the seventh clause, under which the present controversy arises,

is as follows: "It is my will that said surviving trustees, from and after the decease of my said wife, (subject to the payment of said annuity and legacies,) continue to hold in trust the other undivided third part of said rest and residue of my said property and estate, including the amount of said legacy of ten thousand dollars, should the same be forfeited for non-compliance with the condition thereto annexed, and also including any unexpended portion of said trust fund of five thousand dollars, but in trust, nevertheless, to be held, managed, and invested by them with a view to safety and profit, and the net income thereof paid semiannually to my niece Anna A. Nye for and during her life, and, to take effect at her decease, I give, bequeath, and devise said third part to her children in equal shares, to them, their heirs, executors, administrators, and assigns forever."

The testator died in the year 1869, and his wife in the year 1885. At the time of the making of the will and at the death of the testator Anna A. Nye had four children, three of whom are now living, and one of whom died on October 22, 1880, and she never had any other children, and died on June 19, 1893. Her child, who died on October 22, 1880, never had issue born alive, was domiciled in the State of New York, and died intestate, leaving a husband surviving, who is Edward G. Judson, and who has been appointed administrator of her goods and estate in this Commonwealth. As such administrator, he claims one fourth of the personalty of the fund to be distributed, and as surviving husband he claims one fourth of any realty, held under the clause quoted for the children of Anna A. Nye, up to the value of \$5,000, under the provisions of Pub. Sts. c. 124, § 1.

On the other hand, the three surviving children of Anna A. Nye claim each one full third of all the estate, real and personal, which was held for her benefit at the time of her death. In other words, these surviving children contend that the remainder to the children of Anna A. Nye was contingent, and did not vest until her death, and then vested in her surviving children only; while the administrator and husband of the deceased child contends that the remainder vested, at the death of the testator, in the four children of Anna A. Nye, and that in right of his deceased wife, who was one of the four, he is entitled to one fourth part of the fund.

Whether the gift to the children of Anna A. Nye was vested

or contingent depends upon the meaning of the words "to take effect at her decease." Do they show an intention to postpone the vesting of the gift until her death, or to postpone until that event the enjoyment only of the gift?

We see no force in the argument made in favor of the three surviving children, that in previous parts of the will the testator has directed payments to be made from and after the decease of his wife, or as soon as may be after his wife's decease, or that immediately after his wife's decease a fund should be set apart, or that in the clause quoted the testator directs the trustees, from and after the decease of his wife, to continue to hold a third of the residue of his property in trust during the life of Anna A. Nye. The annuity would of course never become payable if the possible annuitant died, as was not the case in fact, before the death of the testator's wife; but the two third parts of the residue given by the sixth clause to two of the trustees is "subject nevertheless to the payment of the annuity and legacies aforesaid," and the testator says nothing to indicate that any of the legacies to natural persons should be payable only in case they survived his wife.

It is well settled that "no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested," and that the absence of "words of contingency, such as 'if they shall be living at her death,' or 'to such of them as shall be living,' the usual and proper phrases to constitute a condition precedent," is to be taken into account. *Blanchard v. Blanchard*, 1 Allen, 223, 225, 226. Added to these considerations is the fact that the children to whom the testator was ultimately giving a substantial portion of his estate were alive when he made his will, and were his great-nieces, and were each of them likely enough to marry and to die leaving children before the death of their mother. If the testator had meant to make the interest of the children contingent upon their surviving their mother, we cannot but think that he would have made some explicit provision disposing of the property in case they should all die before her. Upon the whole, we are of opinion that the testator, by the words "to take effect at her decease," intended only to say that the third which he gave to the children should then be taken out of trust, and be theirs in right of possession, as well as in interest, and that in accordance

with his intention, a right to one fourth of the trust estate vested in each of the children at his death. *Gibbens v. Gibbens*, 140 Mass. 102. *Wardwell v. Hale*, ante, 896.

So far as the property is real estate, the share of the deceased child, being less than five thousand dollars in value, passed to her husband under the provisions of Pub. Sts. c. 124, § 1, and the petitioners should so treat it. So far as it is in personal property, the share of the deceased child should be paid over by the petitioners to the administrator of her estate in this Commonwealth, to be disposed of by him according to law as assets of her estate.

The deceased child at her death was domiciled in New York, and it appears that her husband and her surviving sisters are at variance as to the distribution of her estate; and it is agreed in this cause that the statutes of New York may be referred to as if in evidence. But the decision of this subsidiary controversy is not necessary to the determination of the matters in issue upon the petitioners' prayer for instructions, and we decline to consider it at the present time. *Decree accordingly.*

C. F. Jenney, for the children of Anna A. Nye.

E. C. Bumpus & E. M. Johnson, for Edward G. Judson.

WALTER BATCHELDER vs. ABBIE A. HUTCHINSON & another.
DANIEL S. SIMPSON vs. SAME.

Suffolk. March 7, 1894. — May 29, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Mechanic's Lien — Person acting for Owner — Amendment after Hearing on the Facts — Meaning of "Contract" in Statute — Insufficient Certificate — Subscribing and Swearing to Statement — Ratification — Rights of Mortgagee under previous Mortgages — Application of Payments by Petitioner — Work done upon Extension over Owner's Line.

If a petition alleges that work for which a mechanic's lien is claimed was done under a contract with E., and that the owner of the land is A., and contains no allegation that E. was acting for A. in making the contract, or that he had any authority under which a lien could be created, the petition is defective; but if, on the case being tried as if the petition had been in proper form, it is proved that when the contract was made one M. owned the property and that E. was authorized by him to make the contract, the petitioner may amend his petition,

and make the necessary allegations in accordance with the facts, on such terms as the Superior Court may prescribe, and the lien may then be established in accordance with the findings of the justice who heard the case.

The word "contract," in Pub. Sts. c. 191, § 5, where it is provided that "the lien shall not avail or be of force against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed," includes not only formal bilateral contracts, oral or written, but also contracts created by an agreement on one side and action under it on the other side, such as to bring the parties into a contractual relation before the mortgage is recorded; and when a contract exists, the lien for all work done under it relates back to the time when the contract first became binding, and the making of a mortgage after an agreement has become binding as a contract does not affect the right to have a lien for work afterward done under the contract; but if the arrangement is binding only from day to day, and the petitioner ceases to work for two months, during which the mortgage is made and recorded, and he resumes work in the following month under an arrangement similar to the former one, he has a lien which cannot be enforced against the mortgagee, but only against the owner subject to the rights of the mortgagee.

The objection that a certificate, filed under Pub. Sts. c. 191, is insufficient, is, so far as the interest of the mortgagee is concerned, rendered immaterial by the fact that no lien can be enforced against him for other reasons; but the imperfections will not defeat the claim of the petitioner against the owner, as provided in § 8 of that chapter.

By Pub. Sts. c. 191, § 6, the statement filed in the registry may be subscribed and sworn to by some one in behalf of the claimant as well as by the claimant himself, and a ratification of such a signing is equivalent to an original authority.

On the trial of a petition to establish a mechanic's lien under Pub. Sts. c. 191, evidence that a mortgage claimed to have preference to the lien under § 5 of that chapter was given to secure the payment of money used in paying previously existing mortgages is rightly excluded, as the mortgagee in taking his mortgage acquires no rights under previous mortgages subsequently discharged.

At the trial of a petition to establish a mechanic's lien under Pub. Sts. c. 191, findings in regard to the proper application of payments by the petitioner, first to the materials furnished, and afterwards to the labor, will not be disturbed by this court, if warranted by the evidence.

At the trial of a petition to establish a mechanic's lien, the respondent contended that no lien could be established because a portion of the building extended over the line of the land described in the petition upon land of an adjoining owner. The judge found the value of the work done by the petitioner upon the extension of the building over the line, and upon that part standing on the land described in the petition. The dimensions of the building were before the court, and an estimate was made by an expert witness who knew all the facts. It also appeared that there was conflicting evidence as to the mason work done upon each of the parts of the building, the particulars of which were not reported. *Held*, that it was fair to infer that these particulars may have been of assistance to the judge in applying the other evidence, and that it could not be said that there was no evidence to warrant the finding that the lien should be sustained for the work done upon that part of the building standing on the land described in the petition.

TWO PETITIONS, under Pub. Sts. c. 191, to enforce mechanic's liens against the respondent Abbie A. Hutchinson, the first for

labor and materials, and the second for labor furnished in the alteration and making over of her house. The Workingmen's Co-operative Bank of Boston appeared, and "claiming an interest in the premises described in said petition as mortgagee," denied the allegations of the petition, and denied that the petitioners had a valid lien upon the premises as against the bank, and that they had complied with the provisions of the statutes relative to mechanic's liens so as to enable them to maintain the liens or enforce them.

Trial in the Superior Court, without a jury, before *Maynard, J.*, who found for the petitioners, and reported the cases for the determination of this court, reserving to the mortgagee, in addition to the questions arising upon the rulings, the right to argue, where evidence was reported, that there was no evidence sufficient to warrant the findings upon the points involved in such evidence. The material facts appear in the opinion.

W. M. Noble, for the Workingmen's Co-operative Bank.

H. L. Whittlesey, for the petitioners.

KNOWLTON, J. These are petitions to enforce liens of mechanics under Pub. Sts. c. 191, and the first question presented by the report is whether the petition of Batchelder is sufficient in form. At the beginning of the trial it was stipulated by the parties that questions of law raised upon the record might be considered by the court as if raised by a demurrer duly filed. The petition of Batchelder alleges that the work for which the lien is claimed was done under a contract with Eben Hutchinson, and that the owner of the land is Abbie A. Hutchinson. It contains no allegation that Eben Hutchinson was acting for the owner in making the contract, or that he had any authority under which a lien could be created. Proof of all the allegations contained in it would not show the existence of a lien, and we are of opinion that, as against the respondent's objection, seasonably taken, the petition is fatally defective.

It was proved that when the contract was made one Mary R. Munroe owned the property,* and that Eben Hutchinson was

* Mary R. Munroe afterwards conveyed to Abbie A. Hutchinson, covenanting that the premises were free from all encumbrances except the mortgage to the Workingmen's Co-operative Bank, so that at the time when the petitioners filed their claims Abbie A. Hutchinson was the owner of the premises.

authorized by her to make the contract. The case was fully tried as if the petition had been in proper form, and we are of opinion that the petitioner should now be permitted to amend his petition, and make the necessary allegations in accordance with the facts, on such terms as the Superior Court may prescribe, and that, upon the making of such an amendment, the lien should be established in accordance with the findings of the justice who heard the case.

It was contended by the mortgagee that the contract alleged was not sufficiently precise, certain, and definite to be the foundation of a lien which would take precedence of the mortgage. The allegation is that Batchelder was requested by Eben Hutchinson to perform and furnish labor and furnish materials to make over a certain house, for which he was to be paid what the labor and materials were worth, and that in consideration of the request and promise he performed and furnished labor and furnished materials. It appears that the request was made and the work begun more than six months before the mortgage was executed. Under the arrangement made between him and Eben Hutchinson he was acting continuously in performing and furnishing labor, both before and after the mortgage was made, during all the time covered by his account. There is no doubt that all the work would be held to have been done under one contract for the purpose of determining the time within which the certificate should be filed in the registry of deeds to preserve the lien. There was but a single hiring of the petitioner, by the terms of which he was to work on the house, and do as much as his employer wanted him to do, and receive a reasonable compensation. The employer might have terminated this contract at any time, as perhaps the petitioner himself might have done; but both continued acting under it until the changes were completed. By Pub. Sta. c. 191, § 1, the lien is given to one who has worked upon a building "by virtue of an agreement with or by consent of the owner of such building or structure, or of any person having authority from, or rightfully acting for, such owner in procuring" the labor. Section 5 is as follows: "The lien shall not avail or be of force against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed." We are of opinion that the

word "contract" in this section includes not only formal bilateral contracts, oral or written, but also contracts created by an agreement on one side and action under it on the other side, such as to bring the parties into a contractual relation before the mortgage is recorded. When a contract exists, the lien for all work done under it relates back to the time when the contract first became binding. The making of a mortgage after an agreement has become binding as a contract does not affect the right to have a lien for work afterward done under the contract. A workman who has commenced work under a contract is not required by the statute to watch the registry of deeds to see whether a mortgage or other conveyance has been made. If there is a change of title, and he is permitted afterwards to continue on working under his contract, he is entitled to the benefit of the statute. *Dunklee v. Crane*, 103 Mass. 470. *Gale v. Blaikie*, 126 Mass. 274. *Amidon v. Benjamin*, 126 Mass. 276.

In *Manchester v. Searle*, 121 Mass. 418, nothing was done on the house by the petitioner until after the mortgage had been made and recorded, and the court held that the arrangement between the parties and the owner was not a contract within the meaning of the statute. There were other facts in the case which indicated that there was no valid lien, but the decision was made on the ground that there was no contract. Mr. Justice Lord says in the opinion: "An agreement to do what is necessary to be done, for a fair price, when such necessity is to be determined by the owner, the work of which is not commenced until after the alienation of the building, is not a contract such as is contemplated by the statute. . . . It was the ordinary case of a mechanic, before entering upon labor for another, agreeing that he would thereafter do such work as the employer wished to have done." The court treated the arrangement as too indefinite and uncertain to be binding upon either party before the work was begun, and held that when the mortgage was made no contract had been entered into. If the petitioner had begun work under the arrangement, the decision might have been different. The later case of *Wilson v. Sleeper*, 131 Mass. 177, holds that such an agreement when acted upon is a sufficiently definite contract under the statute. In the present case it had been acted upon a long time before the making of the mortgage.

In the case of Batchelder we are therefore of opinion that this objection is not well taken.

In the case of Simpson the facts are different. He was working by the day under an arrangement which was binding upon the parties only from day to day, so long as they continued to act under it. In December, 1891, he was drawn as a juror, and served in that capacity through the following January and February. The mortgage was made and recorded on February 2, 1892. In March he began to work again on the building. When he gave up his work in December, there was no contract between him and Hutchinson for any future service, and his work done afterwards was under a new arrangement similar to the former one. It cannot be held that it was under a contract existing when the mortgage was made. We are therefore of opinion that he has no lien which can be enforced against the mortgagee. For labor performed under this last employment he has a lien upon the property as against Abbie A. Hutchinson, subject to the rights of the mortgagee. Pub. Sts. c. 191, § 36.

It was objected by the mortgagee that the certificate filed by Simpson was insufficient. So far as the interest of the mortgagee is concerned, this objection is now immaterial. In reference to the present owner, who was defaulted, it may be said that the imperfections of the certificate will not defeat the claim of the petitioner. Pub. Sts. c. 191, § 8.

By the express provisions of the statute the statement filed in the registry may be subscribed and sworn to by some one in behalf of the claimant as well as by the claimant himself. Pub. Sts. c. 191, § 6. A ratification of such a signing is equivalent to an original authority.

The evidence that the mortgage was given to secure the payment of money which was used in paying previously existing mortgages was rightly excluded. The mortgagee in taking its mortgage acquired no rights under the previous mortgages which were subsequently discharged.

The findings in regard to the proper application of payments by Batchelder, first to the materials furnished, and afterwards to the labor, were warranted by the evidence.*

* It appeared that Eben Hutchinson had, during the progress of the work, paid various sums of money at various times to the petitioner Batch-

The respondent corporation contended that no lien could be established in either case because a portion of the building extended over the line of the land described in the petition upon land of an adjoining owner. This contention would be correct if there were no evidence to show the amount due for the labor performed upon that part of the building which stands upon the land of the respondent, but the judge found the value of the work done by each petitioner upon the extension of the building over the line, and upon that part standing on the land described in the petition. If there was evidence to warrant the finding, we are of opinion that the lien should be sustained for the work done upon this part of the building. *Stevens v. Lincoln*, 114 Mass. 476, 478. The evidence reported upon this part of the case is meagre, but the dimensions of the L were before the court, and an estimate was made by an intelligent expert witness who knew all the facts; moreover, it appears that there was much conflicting evidence in regard to the mason work done upon each of these parts of the building, the particulars of which are not reported. It is fair to infer that these may have been of assistance to the judge in applying the other evidence and in making his finding. We cannot say that there was no evidence on which the finding could be made.

If the petition of Batchelder is amended so as to state the essential facts correctly, the lien in his favor should be established in accordance with the findings of the judge. The lien of Simpson should be established against the equity of redemption owned by Abbie A. Hutchinson, but not against the title of the mortgagee.

So ordered.

elder; that he had also paid for some bills and materials himself; that the total sum so paid to the petitioner was \$1,524.70; that the petitioner had furnished materials to the amount of \$652.60, and that this amount he had deducted from the total sum paid him by Hutchinson, and the balance, \$872.10, he had applied to the credit of charges of labor. Batchelder testified that he had an understanding with Hutchinson as to what job he should credit money which was paid him specially by Hutchinson; that the understanding was that Hutchinson should give him money to buy stock with; that he did not always so do, but sometimes gave him money afterwards to pay for it, and when he got short of money he told Hutchinson that if he, the petitioner, was to carry on the labor, Hutchinson must furnish money to pay the help with, and that he did not apply the money to pay the men, but paid the bills for materials, and whatever was left he handed over to the men.

OSCAR KALLECK vs. GARDNER G. DEERING & others.

Suffolk. March 7, 1894. — June 4, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Master and Servant — Seaman — Fellow Servant.

The owners of a coasting vessel are not liable for injuries occasioned to a seaman on board the vessel while in port, and in command of the mate, through the breaking of a triangle on which the seaman was sitting and scraping the mast, where they have furnished proper materials for the construction of the triangle and the injury is caused by the negligence of the mate in constructing it and in ordering the seaman to use it.

TORT, against the owners of a vessel for personal injuries occasioned to the plaintiff while on board the vessel in harbor through the breaking of a triangle on which the plaintiff was sitting and scraping a mast. Writ dated March 17, 1890.

At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict for the plaintiff, and the judge, at the request of the parties, reported the case for the determination of this court. The facts appear in the opinion.

C. T. Russell, Jr., for the defendants.

J. M. Browne, for the plaintiff.

HOLMES, J. This is an action of tort for personal injuries suffered on board a coasting vessel while in harbor, through the breaking of a triangle on which the plaintiff was sitting and scraping a mast. As the case comes before us, we must take it that the defendants did their duty in furnishing materials for the construction of the triangle, that the mate was in control of the vessel at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle and in ordering the plaintiff to use it. The question is whether the defendants are answerable for this conduct of the mate.

By the common law as understood in this State, the work of construction was not one of the matters which the defendants were bound at their peril to see done with reasonable care, and therefore, if those engaged upon it were fellow servants in their general standing and occupation, the plaintiff took the risk of

their negligence. They were not removed from the class of fellow servants for the time being by the nature of their occupation, to adopt the mode of expression which has been used. *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209. *Moynihan v. Hills Co.* 146 Mass. 586. *Allen v. G. W. & F. Smith Iron Co.* 160 Mass. 557. But if the work had been done by the defendants in person, and they had done it negligently, they would have been liable, and it is argued that they are equally liable when the work is done by the master of the vessel, or by one who for the time being stands in his place. It is said that the master is not a fellow servant with the seamen, and therefore is not within the rule as to the risks assumed by the plaintiff, but that he is nevertheless an agent and representative of the owners, and that his negligence is their negligence. Even if it be said, as it has been said in some cases, that masters are not liable to servants for the negligence of others except when the law on grounds of policy imposes a personal duty on them to see certain precautions taken or reasonable care used; and if it be admitted therefore that the defendants could not be liable for negligence in the construction of the triangle on the part of the master, whether a servant or not, any more than when the same work was done by the seamen; (*Quinn v. New Jersey Lighterage Co.* 23 Fed. Rep. 363; *The Queen*, 40 Fed. Rep. 694, 696; *Loughlin v. State*, 105 N. Y. 159, 162; *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 385;) still, ordering the plaintiff to use the faulty triangle was an act belonging to the superior officer as such, and it might be that as to that a different rule would apply.

Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion cannot prevail. If the sailor takes the risk of a negligent injury to his person from a fellow sailor, there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise. It is not like a permanent condition of land or machinery, or the abiding incompetence of an employee. See *Flynn v. Campbell*, 160 Mass. 128, 130. If the defendants have been guilty of no personal negligence, and the plaintiff does take the risk of the negligence of some persons with whom his work will bring him into contact, the question whether the negligence of one of those

persons is within or outside of the risks assumed is not a matter of names or dignities. That is too well settled to need the citation of cases. *Moody v. Hamilton Manuf. Co.* 159 Mass. 70. The question is what he must be taken to have contemplated when he went into the employment. The chances of negligence on the part of a superior employed in the common business are as obvious as in the case of one of a lower grade, and therefore when the duty is not personal to the employer the same rule applies, whatever the degree of the negligent employee. *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 384. These considerations apply, and have been applied by common law courts, to the captain of a vessel, and it has been said that he is a fellow servant within the meaning of the rule. *Hedley v. Pinkney & Sons Steamship Co.* [1892] 1 Q. B. 58. *Loughlin v. State*, 105 N. Y. 159. So in this Commonwealth as to a mate. *Benson v. Goodwin*, 147 Mass. 237. Without considering what may be the best mode of expressing it, we agree with the result of these cases.

But it is argued that a different doctrine obtains in the admiralty, and that we ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen. For this argument it does not matter precisely where the vessel was. If the accident happened within the body of the county the admiralty jurisdiction would not be excluded; *Waring v. Clarke*, 5 How. 441; *The Commerce*, 1 Black, 574; and if upon the high seas, that of the common law is not to be denied. *Percival v. Hickey*, 18 Johns. 257. *Wilson v. Mackenzie*, 7 Hill, (N. Y.) 95, 97.

The case most relied on is *The A. Heaton*, 43 Fed. Rep. 592, followed by *The Frank & Willie*, 45 Fed. Rep. 494, and *The Julia Fowler*, 49 Fed. Rep. 277. Compare *Morse v. Slue*, 1 Vent. 238; *S. C.* 3 Keb. 135, 1 Molloy de Jure Marit. book 2, c. 2, § 2. If the American cases meant that the admiralty courts had worked out the liability of the ship for the acts of the captain from their own peculiar principles, it might be necessary to inquire whether the personal liability of the owner necessarily followed from the same premises, and if it did, why the common law should yield to the admiralty rather than the admiralty to the common law. But it hardly is to be expected that different

views of the substantive law should be enforced by the same judges sitting in different courts. In *The A. Heaton*, Mr. Justice Gray did not declare a doctrine peculiar to the admiralty, he merely deferred to a decision upon the common law from which he himself had dissented, which is inconsistent with the cases in this Commonwealth, and which has been explained by a later decision of the court which rendered it. *Chicago, Milwaukee, & St. Paul Railway v. Ross*, 112 U. S. 377. See *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368. Under these circumstances the Circuit Court cases do not seem to us a sufficient reason for departing from the common law because the accident happened on board ship. Moreover, it is very plain that we cannot adopt the admiralty law as a whole. We cannot divide the damages when the plaintiff has been guilty of contributory negligence, as was done in *The Julia Fowler*. *The Max Morris*, 137 U. S. 1. See *Dowell v. General Steam Navigation Co.* 5 El. & Bl. 195, 206. *Verdict set aside.*

LOUISA A. MILLER, administratrix, vs. E. A. HYDE.

Middlesex. December 4, 1893. — June 19, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trover — Effect of Judgment for Plaintiff in Trover on Title of Chattel converted — Estoppel — Lex Fori — Case stated — Replevin.

The title to property which has been converted is not transferred to the defendant by the entry of a judgment for the plaintiff in an action of trover and by a levy of the execution upon the property converted, but remains in the plaintiff until he has received actual satisfaction. FIELD, C. J., HOLMES & KNOWLTON, JJ., dissenting.

A., living here, bought a horse through his agent B., who kept it for him in Connecticut. After the death of A. his administrator demanded the horse of B., who refused to deliver it to him, and afterwards sold it as his own property to C. A.'s administrator then brought an action of trover in Connecticut against B. and C., and attached the horse as the property of B. He recovered judgment against B. only, on which execution was issued and delivered to an officer, who, after an ineffectual demand on B. for its payment, levied on the horse, but before he had sold it the horse was replevied from him by C., and while C.'s suit was still pending in Connecticut, and while the judgment there against B.

remained unsatisfied, the horse was brought into this Commonwealth by the agent of C., from whom it was replevied by the administrator of A. *Held*, that the title of the administrator of A. to the horse was not defeated, nor his right of recovery barred, either by bringing the action, or by obtaining judgment against B., or by procuring the horse to be attached on mesne process or seized on execution as the property of B., and that he was not estopped thereby from maintaining the action of replevin in this Commonwealth. *Held, also*, that the pendency of the replevin suit in Connecticut between C. and the officer was not a bar or defence to the replevin suit here. *FIELD, C. J., HOLMES & KNOWLTON, JJ., dissenting.*

The effect of an action of trover upon the title of the plaintiff to property alleged to have been converted is to be determined by the law of the forum, but where the effect of such an action brought in another State is drawn in question here in an action submitted upon a statement of agreed facts which does not state the law of such other State, the law of this Commonwealth must be applied.

REPLEVIN of a horse. Writ dated August 10, 1892. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows.

The horse in question was purchased in July, 1890, by Herbert W. Miller, a resident of Boston, through his agent, George Bryden, of Hartford, in the State of Connecticut, who thereafter kept it for him in Hartford. Miller died in September, 1890, and in the following November the plaintiff, who was his widow, having been appointed administratrix of his estate, demanded the horse of Bryden, who refused to deliver it to her, claiming to own a half interest therein. In March, 1891, Bryden sold and delivered the horse as his own property to Joseph C. Davenport and Ada L. Hyde, both residents of Connecticut.

Ancillary administration was subsequently granted to the plaintiff in Connecticut, and in November, 1891, she brought an action in that State against Bryden, Davenport, E. A. Hyde, and one Shillinglaw, for the conversion of the horse, which was in the possession of the three last named defendants, and attached the horse upon mesne process. She recovered judgment against Bryden only, on which execution was issued and delivered to an officer, who, after an ineffectual demand on Bryden for its payment, levied on the horse and advertised it for sale, but before he had sold it it was replevied from him by Davenport.

In August, 1892, Davenport intrusted the horse to the defendant, who brought it into this Commonwealth, where it was replev-

ied by the plaintiff. When this action was begun, the judgment recovered in trover against Bryden, who was financially worthless, remained unsatisfied, and the replevin suit of Davenport against the officer was still pending in Connecticut.

The case was argued at the bar in December, 1893, and afterwards was submitted on the briefs to all the judges.

E. A. Whitman, for the plaintiff.

J. H. Morrison, for the defendant.

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee, who had wrongfully usurped dominion, and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that in early times title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction; see *Atwater v. Tupper*, 45 Conn. 144; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1; *Ex parte Drake*, 5 Ch. D. 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533 and note; and the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law.

Whenever the title passes, as there has been no sale or gift, and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent in-

justice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias*, because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice, rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in *trover* usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that without some actual satisfaction the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. *Trover* is but a tentative attempt to obtain justice for a wrong, and until pursued so far that it has given actual satisfaction ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in

satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can without a fresh taking maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. See *Bennett v. Hood*, 1 Allen, 47; *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331; *Bliss v. New York Central & Hudson River Railroad*, 160 Mass. 447. If he is so restricted, it is not because the ownership of the chattel has been transferred.

But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached upon mesne process, and since obtaining judgment she has caused the horse to be seized as property of Bryden in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same parties. *White v. Dolliver*, 113 Mass. 400. *Newell v. Newton*, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage, is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process or seized on execution as the property of another does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct, there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special purpose only be treated as the property of another. This is

"consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do"; and he may well wait to see the issue, which may be such as to avoid the litigation of the question of title. See *Mackay v. Holland*, 4 Met. 69, 74; *Dewey v. Field*, 4 Met. 381, 384; *Johns v. Church*, 12 Pick. 557; *Bursley v. Hamilton*, 15 Pick. 40, 43; *Edmunds v. Hill*, 133 Mass. 445, 446. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property which does not divest him of title or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. The case of *Ex parte Drake*, above cited, is an authority to the point that a plaintiff who has brought an action of detinue and taken judgment both for the detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel *in specie*. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress.

In the present case, the natural construction to be put upon the plaintiff's conduct in attaching and beginning a levy upon her own horse in a suit asserting her ownership is, that, while she contended that in fact the horse was her own, she consented that, if litigation as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her

right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless she was barred by the rules of estoppel.

Upon the question of estoppel, it is material to the decision of the present case to consider only whether she is estopped as to the present defendant or his principal Davenport. Whether she has rendered Bryden, or the officer who made the attachment or the levy in the Bryden suit, liable to costs, expenses, or chance of loss, is not material upon the question whether she is barred by the doctrines of estoppel from maintaining the present action. She is now prosecuting one of several successive wrongdoers for a fresh interference with the possession of her property; and neither the present defendant, Hyde, nor Davenport, for whom he claims to be acting as agent, has done or suffered anything, or been put to any liability by reason of which the plaintiff should be estopped from asserting her title. Upon the facts, Davenport in taking the horse in replevin did not rely upon the attachment or levy, but acted in denial of their validity; and Hyde is not shown to have been influenced by them in consenting to become Davenport's agent in keeping the horse, or in any manner. Neither Hyde nor Davenport is shown to have changed his position or course of conduct relying upon the plaintiff's action in causing the attachment or the levy, and the plaintiff is not estopped by it from maintaining the present action. In the opinion of a majority of the court, the result must be,

Judgment set aside, and judgment for the plaintiff ordered.

HOLMES, J. As the judges are not unanimous it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It always has seemed to me that one whose property has been converted has an election between two courses, that he may have the thing back or may have its value in damages, but that he cannot have both; that when he

chooses one he necessarily gives up the other, and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general an election is determined by judgment. *Butler v. Hildreth*, 5 Met. 49. *Bailey v. Hervey*, 135 Mass. 172, 174. *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86. *Raphael v. Reinsteint*, 154 Mass. 178, 179. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not of one giving nominal damages for the taking. The argument from election is adopted in *White v. Philbrick*, 5 Greenl. 147, 150, which so far as I know is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Cliff. 191, 198. See also Shaw, C. J., in *Butler v. Hildreth*, 5 Met. 49, 53.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the dictum in Jenkins, 4th Cent., Case 88, *Solutio pretii emptionis loco habetur*, which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale; but they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer or met by paramount considerations of policy, but because they did not have either that or a clue to the early cases before their mind. *Lovejoy v. Murray*, 3 Wall. 1, 17. *Brinsmead v. Harrison*, L. R. 6 C. P. 584, 587; *S. C.* L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In *Brinsmead v. Harrison*, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility—it is only the possibility—of an election turning out to have been unwise, is a sufficient reason for breaking in upon a

principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

That the view which I hold is the view of the common law I think may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI. 65, pl. 5, Newton says: "If you had taken my chattels it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not." In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds, "And so it is of goods taken, one may devest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue," if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff and trespass disaffirms it, and that the plaintiff has election. Bro. Abr. Trespass, pl. 134. 18 Vin. Abr. 69 (E). · Anderson & Warberton, JJ., in *Bishop v. Montague*, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession, at least if not felonious, carried with it a title by wrong in the case of chattels as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland, 3 Harv. Law Rev. 23, 326. See 1 Law Quarterly Rev. 824. I do not regard that as a necessary doctrine, or as the law of Massachusetts, but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and on the same principle trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff after judgment were to retake the chattel by his own act, it would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet on the view which I oppose I presume that the judgment could not be collected. See *Coombe v. Sansom*, 1 Dowl. & Ry. 201.

It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*. *Bishop v. Montague*, Cro. Eliz. 824. Fenner, J., in *Brown v. Wootton*, Cro. Jac. 73, 74; *S. C.* Yelv. 67; Moore, 762. *Adams v. Broughton*, 2 Strange, 1078; *S. C.* Andrews, 18, 19. *Buckland v. Johnson*, 15 C. B. 145, 157, 162, 163. Sergt. Manning's note to 6 Man. & Gr. 640. See *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. *Hepburn v. Sewell*, 5 Har. & J. 211. *Smith v. Smith*, 51 N. H. 571, and 50 N. H. 212. Compare *Atwater v. Tupper*, 45 Conn. 144, 147, 148.

The only authorities binding upon us are the ancient evidences of the common law as it was before the Revolution and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it. *Campbell v. Phelps*, 1 Pick, 62, 65, 70. *Bennett v. Hood*, 1 Allen, 47. Many cases in other States are collected in *Freem. Judgments*, (4th ed.) § 237.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there, but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel valid in the place where it was made and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law. It is not argued that the defendant stands

any worse than Bryden, against whom the judgment was recovered and from whom the defendant's bailor bought the horse.

KNOWLTON, J. I am of opinion that the judgment in this case should be for the defendant. It is a general rule of law that when one is entitled to either of two inconsistent remedies for a wrong done him, the pursuit of one of them so far as to affect the interests of the other party is a conclusive election, and a waiver of the other. *Hooker v. Olmstead*, 6 Pick. 481. *Butler v. Hildreth*, 5 Met. 49, 53. *Arnold v. Richmond Iron Works*, 1 Gray, 434, 440. *Connihan v. Thompson*, 111 Mass. 270. *Washburn v. Great Western Ins. Co.* 114 Mass. 175. *Ormsby v. Dearborn*, 116 Mass. 386. *Seavey v. Potter*, 121 Mass. 297. *Bailey v. Hervey*, 135 Mass. 172, 174. *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86. *Raphael v. Reinstein*, 154 Mass. 178. It is under this rule that the owner of property wrongfully taken by another is held to be precluded from claiming it after he has elected to recover the value of it from the wrongdoer. The property passes, not because there has been a sale, but because the owner has elected to receive instead of it that which represents it, and because it would be unjust to permit him to take the property after having chosen the money which is its equivalent. The principal question in cases of this kind is at what stage of the proceedings the owner shall be deemed to have made an election that binds him. On principle, and as a general rule, he should be bound by the election he makes, if in making it he goes so far as to affect the rights or interests of the other party. It would be unjust, when he may proceed only in one or the other of two opposite directions, that he should go forward in one direction in such a way as materially to affect the other party, and then turn backward and go on in the other, and compel his adversary to satisfy him in a different way.

In very early cases it was held that the owner of property unlawfully taken makes a conclusive election of his remedy which passes the property as between the parties when he takes judgment for the value of it against the wrongdoer. He thereby puts his claim for property of which he chooses to say that he has been divested into the form of a debt apparent of record, for the satisfaction of which he may at any time have execution from the court.

But where nothing more is done than to take a judgment without security there are considerations which have led in many courts to a modification of the rule in favor of the owner. Sometimes when he brings his suit in trover he is unable to find the property, and very often his judgment for the value of it cannot be made available. In taking judgment he merely puts in form and settles by adjudication a claim for the value of the property, to which he was entitled from the beginning if he chose to enforce it. He does not otherwise disturb the defendant or his property, and, while it would doubtless be more logical to say that he is concluded by his election as soon as he has recovered judgment, it is perhaps a practical rule which will more generally work out justice to hold that if he does nothing more to collect the money, and if he proceeds within a reasonable time, he may still take the property as his own. But if, having fixed the liability of the defendant for a debt by taking judgment, he says by his conduct that he intends to collect the debt, and does that which affects the interests of the defendant in that particular, he should be deemed to have made his election conclusive.

The cases which say that the rights of the parties in regard to the title are fixed, not by taking judgment, but by obtaining satisfaction, cannot mean that one may take judgment for the full value of the property, and collect one half or two thirds of the amount, and may afterward take and hold the property itself under his original title. Many of these cases were in jurisdictions where attachment on mesne process is not permitted, and where there is no security for a judgment when it is rendered. So far as I am aware, there is no case in which is considered the effect of taking judgment in a suit where there was an attachment which secured the collection of the judgment, or the effect of a partial satisfaction, or of a proceeding after judgment to enforce it by a levy on the property. It seems to me there is good ground for holding that, when one undertakes to collect the value of his property by making an attachment to secure the judgment which he may obtain, and then prosecutes his claim to judgment, he has done that which affects the rights of the other party far more than the mere recovery of a judgment on an unsecured claim. But however that may be, when after judgment the plaintiff proceeds to obtain satisfaction by a levy on

the defendant's property, and much more when he levies on the property for the value of which he obtained judgment, and advertises it for sale as the property of the defendant, he should be held to have fixed his rights and the rights of the other party in regard to the title beyond his power to change them. By taking the defendant's property to satisfy the execution he subjects him to the legal costs and expenses attendant upon the levy, and deprives him of what otherwise he would have. Even if he afterwards returns the property, he puts upon him the risk of loss or depreciation in value while it is held. If the property had not been taken on execution, the defendant might have negotiated to obtain the means of satisfying the execution by disposing of the property, or he might have attempted to satisfy it in some other way. He may have relaxed his efforts, relying on the levy, and if the plaintiff is permitted to abandon the levy and proceed in another way he may ultimately suffer loss on account of what the plaintiff did. This is equally true whether the property is that for which the plaintiff recovered his judgment or not, and if it is the same the plaintiff's act is a distinct and positive assertion that the property is the defendant's by reason of his judgment and of his purpose to collect the judgment and to apply the proceeds of the property in the satisfaction of it. Unless the rule stated at the beginning of this opinion is to be abrogated altogether, it must be held that when a plaintiff has elected to take judgment for the full value of property converted, and has then levied the execution upon property of the defendant which is subject to be taken on execution — especially if it is the property converted — he is thereby precluded from reversing his election and taking the converted property under his original title.

The case of *Ex parte Drake*, 5 Ch. D. 866, cited in the opinion of the majority of the court, was an action of detinue, where by the terms of the judgment the plaintiff was to have either the property or the ascertained value of it.

If the plaintiff cannot abandon her judgment and levy, and reclaim the horse as against Bryden, she cannot as against this defendant, who is in privity with Bryden through Davenport, who is a *bona fide* purchaser from Bryden. So far as the pending proceedings in Connecticut under the levy and the subse-

quent replevin suit there affect the title, they are binding on the plaintiff here, for the officer was acting in enforcement of her rights by her direction, and she is therefore in privity with him. His relation to her is very different from that of a mere bailee.

The Chief Justice concurs in this opinion.

WILLIAM H. ALLEN vs. ROBERT D. EVANS & another.

Suffolk. January 11, 1894. — June 19, 1894.

Present. FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Party Wall — Implied Contract.

The original owner of two adjoining lots of land built houses thereon with a party wall between them, and afterwards sold the two houses to different purchasers, imposing no obligation upon either purchaser in respect to the party wall. A predecessor in title of the plaintiff, being the owner of one of the lots, strengthened the foundation, and built the party wall higher. The defendant, owning the adjoining lot, built his house higher, and used the wall so built by the plaintiff's predecessor in title. After this had been done the plaintiff bought his lot, and sought to make the defendant pay for such use of the wall. *Held*, that in the absence of a stipulation or agreement that such payment should be made a contract therefor could not be implied, and that the defendant had a right to use so much of the party wall as stood upon his own land without paying for such use.

CONTRACT, to recover for the use of a party wall. Writ dated February 16, 1892.

The first count of the declaration alleged that prior to 1822 Samuel G. Perkins, who was the owner of two adjoining lots of land on Bedford Street in the city of Boston, built houses thereon with a party wall between them; that he afterward sold them to different purchasers, in each deed the boundary line between the houses being described as "a line running through the middle of said partition wall"; that in 1870 one of the lots was conveyed to the Union Institution for Savings, which at its own expense strengthened the foundation and built the party wall higher; that in 1871 the other lot was conveyed to the defendants, who built their house higher, and used the wall so built by the Union

Institution for Savings; that in 1886 the Union Institution for Savings conveyed its lot to the plaintiff; that the defendants have continued to use the party wall in the manner described, and have never paid for such use, wherefore they owe the plaintiff for the value of such addition. The second count was for a further use of the addition to the party wall made since the plaintiff became the owner of his lot.

The defendants demurred to the declaration, and assigned as grounds of the demurrer, that the plaintiff had not stated a cause of action, and that the plaintiff had not set forth any contract between himself and the defendant.

The Superior Court sustained the demurrer; and the plaintiff appealed to this court.

The case was argued at the bar in January, 1894, and afterwards was submitted on the briefs to all the judges.

R. S. Gorham, for the plaintiff.

G. L. Huntress, (*H. Albers* with him,) for the defendants.

ALLEN, J. The original owner of two adjoining lots built houses thereon with a party wall between them, and afterwards sold the two houses to different purchasers, imposing no obligation upon either purchaser in respect to the party wall. A predecessor in title of the plaintiff, being the owner of one of the lots, strengthened the foundation and built the party wall higher. The defendants, owning the adjoining lot, built their house higher, and used the wall so built by the plaintiff's predecessor in title. After this had been done, the plaintiff bought his lot and now seeks to make the defendants pay for using the wall. There was no stipulation or agreement in any form that such payment should be made, and there is no implied contract to pay for such use of a party wall. The defendants had a right to use so much of the party wall as stood upon their own land in the manner in which they did use it, without paying anything for such use. *Wilkins v. Jewett*, 139 Mass. 29. *Joy v. Boston Penny Savings Bank*, 115 Mass. 60. *Brooks v. Curtis*, 50 N. Y. 639. The case is to be distinguished from those in which there was an agreement or stipulation for payment, like *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 Mass. 111; and *Richardson v. Tobey*, 121 Mass. 457.

Judgment for the defendants affirmed.

PAUL PFEIFFER vs. NATHAN MATTHEWS.

Suffolk. January 15, 1894. — June 19, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.*Party Wall.*

In a written agreement between adjoining owners of land that when any portion of a party wall built by either of them "shall be used by the party or by the heirs or assigns of the party by whom the portion of the wall so used was not constructed, he or they shall pay to the party who constructed the same, or to his heirs or assigns, owners of the said premises, one half of the actual cost of the portion of the wall . . . so used by him or them," using the wall means making use of it in the process of the construction of a house on the adjoining lot, and the person using it is the builder of the house, and under such an agreement neither a grantee nor mortgagee of the builder is liable for the cost of the wall so made use of by him.

CONTRACT, to recover one half of the cost of a party wall.
Writ dated September 14, 1892.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows.

The plaintiff and Nathan Matthews, Jr., who were owners of adjoining lots of land situated on Falmouth Street in Boston, on April 21, 1888, executed an agreement which, after granting to either party thereto the right to erect a party wall on the boundary line of their respective estates, contained a provision that "when any portion of any wall so built, extended, or rebuilt shall be used by the party or by the heirs or assigns of the party by whom the portion of the wall so used was not constructed, he or they shall pay to the party who constructed the same, or to his heirs or assigns, owners of the said premises, one half of the actual cost of the portion of the wall (including the piling and the foundation thereof) so used by him or them." Shortly thereafter, the plaintiff erected such a wall, in accordance with the terms of the agreement.

On April 28, 1888, Nathan Matthews, Jr. conveyed his land to his father, the defendant, who on April 30 conveyed the same to William Bassett, at the same time taking back from him a

mortgage of the land for \$11,300. All the conveyances were made subject to the party wall agreement.

In August, 1888, Bassett began the erection of a building on the land conveyed to him, and used the party wall in its construction, but in December, 1888, when the building was completed as far as the first floor, he was adjudged insolvent, and in consequence thereof work on the building ceased until June 20, 1889.

In March, 1889, Bassett received his discharge in insolvency, and in April, 1889, he released all his rights in the premises to the defendant, who on June 15, 1889, again conveyed to him the premises, taking back a mortgage for \$11,300 payable in one year, the consideration of which was the agreed price of the land, and the amount of certain advances agreed to be made by the defendant by a contract of even date therewith.

After this, Bassett, on June 20, 1889, resumed work on the unfinished building, and by August, 1889, had the roof in place. The work was paid for by Bassett partially out of advances made by the defendant, and partially from his own resources.

The last named mortgage was on July 18, 1890, assigned by the defendant to one Howe, who on July 28, 1890, made entry to foreclose for breach of condition, and on August 21, 1890, sold the premises by auction, under a power of sale contained in the mortgage, to one Robinson.

Both Howe and Robinson acted entirely in the interest of the defendant, and never had any beneficial interest in the premises, and the defendant received no consideration for his deeds to Bassett except the mortgages taken back from him. The advances by the defendant to Bassett did not exceed sixty per cent of the cost of the building.

The case was argued at the bar in January, 1894, and afterwards was submitted on the briefs to all the judges.

F. Rackemann, (*F. V. Balch* with him,) for the plaintiff.

F. W. Kittredge, for the defendant.

ALLEN, J. The clause of the agreement upon which the plaintiff's claim rests is as follows: "When any portion of any wall so built, extended, or rebuilt shall be used by the party or by the heirs or assigns of the party by whom the portion of the wall so used was not constructed, he or they shall pay to the party who constructed the same, or to his heirs or assigns, owners

of the said premises, one half of the actual cost of the portion of the wall (including the piling and the foundation thereof) so used by him or them."

Using the wall means making use of it in the process of constructing the house on the adjoining lot, and the builder of such house is the person who uses the wall. Under such an agreement the liability to pay for one half of the cost of the wall does not extend to a grantee of the builder.

The plaintiff however contends that a mortgagee of land which is subject to a party wall agreement is liable as assignee of the covenants for a use of the wall made by the mortgagor. No case has been cited which thus holds, and we see no good reason for establishing such a doctrine. A mortgagee before foreclosure has no estate which can descend to his heirs, but by foreclosure the lien is converted into an estate, and the mortgage is changed from personal to real property. Pub. Sts. c. 133, § 6. *Fay v. Cheney*, 14 Pick. 399. *Steel v. Steel*, 4 Allen, 417. *Haskins v. Hawkes*, 108 Mass. 379. As to everybody but the mortgagee, the mortgagor is the owner until foreclosure. Until then, or at least until entry for breach of condition, the adjoining owner has no concern with the mortgagee. It is the mortgagor alone who is using the party wall by building a house upon his lot.

By the agreed statement of facts, it appears that no work was done upon the wall while the defendant was owner of the adjoining lot. The first stage of the work was done while Bassett was in possession as mortgagor, and the work was stopped owing to his insolvency. It does not appear that the defendant had anything to do with the mortgagor's insolvency or with the stopping of the work. No entry was made for breach of condition. It is stated that while things were in this condition Bassett released all his rights in the premises to the defendant. It would seem that such release could have conveyed nothing, as the title was then in his assignee in insolvency. But assuming that the defendant then became owner of the equity, no work was done while he remained the owner. Soon afterwards he again conveyed the premises to Bassett, taking back a mortgage, and thus Bassett again became mortgagor, and the defendant mortgagee. After this had been done, work on the building was renewed and completed. Nearly a year after its completion, the defendant's mortgage was foreclosed.

The defendant's liability is no greater than if at the time of the foreclosure he had purchased the equity of redemption and taken a deed from the mortgagor. Under the agreement, the heirs or assigns of the original party to the contract are not liable to the plaintiff unless they have used the wall. The wall was used by Bassett alone. The continuance of the building after its erection is not a use of the wall within the meaning of the contract. The defendant's present ownership of the building is not a use of the party wall by him which makes him liable under the contract.

The plaintiff further argues that the conveyance to Bassett was a sham, and that the defendant was virtually the owner all the time. But the case comes before us on an agreed statement of facts. No such fact is agreed, and we cannot draw that inference.

Judgment for the defendant affirmed.

EMMA W. BURBANK & others vs. MARGARET A. SWEENEY.

Middlesex. January 15, 1894. — June 19, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Devise — Power of Disposal by Will.

A testator, who was not a lawyer, by his will drawn by himself gave all his estate to his wife for life with remainder over of portions thereof to nephews and a charity, and the residue he left to his wife "to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of above to my heirs at law." *Held*, that the wife was given a power of disposal thereof by will as well as by deed during her life.

WRIT OF ENTRY, dated January 21, 1893, to recover a parcel of land in Natick. Plea, *nul disseisin*.

The case was submitted to the Superior Court, and after judgment for the demandants, to this court, on appeal, on agreed facts, the material portions of which appear in the opinion.

The case was argued at the bar in January, 1894, and afterwards was submitted on the briefs to all the judges.

P. H. Cooney, for the tenant.

J. F. Wiggin, for the demandants.

BARKER, J. The testator first gave all his estate to his wife for life, and then proceeded to deal with the remainder after her death by giving to a nephew one piece of land and two thousand dollars, to another nephew another piece of land, and to an academy three thousand dollars, the income of which is "to be appropriated to aid some religious young man or men of promise in their preparation for college." The will concluded with this provision: "Item 4th. The remainder of my estate I leave for my wife to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of as above to my heirs at law."

The demandants are his nephews and nieces and his heirs at law. The demanded premises were his home until his death, in the year 1873, and the home of his widow until her death, on October 26, 1891. She made no sale or conveyance, but by a will executed on June 27, 1890, devised the premises to the tenant. The testator was not a lawyer, and his will was drawn by himself.

The tenant contends that the will gave to the widow a power of disposal by will, while the demandants contend that the clause "but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of as above to my heirs at law," limits her power to conveyances to take effect during her life, so that she had no power of disposal by will, and that they are entitled to recover as devisees.

While the fact that the testator was not a lawyer is of some significance, the will does not indicate ignorance; while it shows some want of accuracy in the use of technical language, the testator would seem to have been able to express his intentions with considerable clearness and force. As might be expected from his situation, possessing an ample property, and having a wife and no children, and no relatives nearer in degree than nephews and nieces, his dominant purpose is to make his wife his chief beneficiary. That he had affection for her and confidence in her judgment is shown by the language, in which

he makes her sole executrix without bonds, as well as by that in which he leaves the bulk of his estate for her to dispose of as she may deem expedient. Considering his circumstances, this power was not conferred with the view of insuring her support if her income should be insufficient for that purpose, but as a mark of esteem and confidence, and to strengthen and dignify her position as an aged widow without children. The will itself shows, by the charitable bequest to take effect after her death, and the gifts to two of his nephews, that he knew that his estate was more than sufficient for her needs, and that he did not have a decisive feeling for his nephews and nieces as a class, but was content to leave it to the discretion of his wife whether four of the six should ever receive any part of his estate. The agreed facts also show that both the testator and his wife were actuated more by the desire to do honor to each other, and to aid in charitable work, than to perpetuate an estate, and the fact that she was so disposed may be presumed to have influenced his action.

The precise question is whether he intended that his widow should have power to dispose by will of the property which he left for her to dispose of as she might deem expedient. Reading the clause in which the testator, after having made in the two previous items of his will three gifts to take effect after the decease of his wife, provides for the ultimate disposal of the rest of his property, and, in so doing, at the outset leaves the bulk of his estate for her "to dispose of as she may deem expedient," a majority of the court think that the testator meant to empower his wife to make a disposition of that part of his estate by will. In the first place, he contemplated that she would hold and enjoy all his property during her life. The appraised value of his whole estate was \$25,000, and of this the demanded premises, on which was his dwelling-house, were appraised at \$3,000. Besides the homestead he had no real estate, except the two parcels which after his wife's decease were given specifically to two nephews, and which were appraised at \$1,000. All of his land except the homestead having been previously given after his wife's death to nephews in such a way that the power of disposal which he was drafting could not affect it, that power was to affect, aside from personalty, only the homestead where he

resided, and where his wife would naturally continue to reside during her life. All of the property to which the power was to apply was property which he would wish and expect his wife to keep throughout her life. To give her a power to dispose of it only by deed or act to take effect during her life would be but an empty gift, requiring, to make it effectual, that she should in her old age divest herself of her money resources or her home. On the other hand, the power to dispose by will would be one in the highest degree beneficial to her, enabling her to enjoy during her whole life all of the property which he had given for her sole use and benefit during that term, and yet placing in her hands the means of rewarding those who should remain faithful to her, and of disappointing the hopes of his heirs if she saw fit. We do not think that the testator by the concluding portion of the sentence intended to restrict the full power of disposition which his words, as read in the light of the whole will and of the circumstances under which it was drawn, were meant to confer, and which included the power to dispose by will. He was writing his own will, and, judging him by it, he knew how to express clearly and explicitly a limitation of the power, if it was his wish to limit it. Not being a lawyer, it is not probable that he knew that an instrument which must be executed by his wife during her life, and which would dispose of the property by words speaking in the present tense, would for technical reasons have no operation during her life, and so might be contended not to be a disposition made during her life. By the words "not disposed of as above," he did not refer to a disposition to be made by his wife under the power, but to the gifts to the two nephews and to the academy made by himself in the two prior items of the will, so that there is no implied iteration by reference of the phrase "during her lifetime," and no implication that those words had to his mind any special meaning or importance. Again, the exact contingency on which the remainder is given to his heirs has not happened. That was "in the event that she should make no disposition of the same during her lifetime." But during her lifetime she did make a disposition by will; and all the acts necessary to make it an operative and effectual disposition must necessarily be done during her lifetime and by her; and the testator's thought in drafting the power would be that, if she

executed it by will, she must do so in her lifetime. The natural signification of the words "during her lifetime," as they are here used by this testator, is either to make it sure that she should have all her life in which to execute the power by will or otherwise, as she might deem expedient, or, as an equivalent for the phrase "after the decease of my wife," which he had used in the two preceding items, showing that the gift to his heirs, even if during her whole life his wife did nothing to dispose of the property, was not to take effect until after her death. In this connection it may be of some weight to note that the word "remainder" in the item we are dealing with is not used as a strict legal term to designate the technical "remainder" after the expiration of his wife's life estate, but such lands and goods as he had not himself disposed of by the second and third items of the will. As there is nothing to indicate that the testator was induced to give the power by the expectation that its execution would be necessary for his wife's support or maintenance, the many cases in which a power evidently given for that purpose is therefore held to exclude the power to dispose by will are not in point. Looking at all the circumstances, we feel that the ruling thought of the testator was one which requires the meaning which we find in his words, and which shows an intention to give her a full and absolute power of disposal.

It remains to inquire whether the words "make no disposition of the same during her lifetime" have acquired a settled meaning contrary to that in which we think they were used by the testator. No case has been called to our attention in which it has been held that a devise over in case the life tenant, with express power of disposition, made no disposition of the estate during her lifetime, carried the remainder if the life tenant disposed of the property by will. In *Perry v. Cross*, 132 Mass. 454, after a devise to his wife in fee the testator added, "It is also my will that if any of the above named property should remain undisposed of by my wife at her decease, the same shall descend and belong to my heirs at law"; and it is said in the decision that "it is clearly to be implied from the language used that she could not devise by will that which was undisposed of at her decease." This could not have been intended to mean that holding land in fee she could not devise it. While it no

doubt is an authority to the point that if Mrs. Perry's power to dispose of the property had been derived only by implication from the last clause of her husband's will, the situation and language then under consideration are not similar to those with which we are now dealing, where there is an express power of disposal as the wife may deem expedient, and for this reason the present case is not governed by *Perry v. Cross*.

In *Kelley v. Meins*, 135 Mass. 231, where a testatrix devised all her property in fee to her son, and afterwards by a codicil provided that, if he should die without leaving issue, any portion of her estate which should remain should be equally divided among her sisters and nieces and their female heirs and assigns, it is held that the true construction of the codicil and the will taken together is, that the son shall have "during his life the absolute power of disposing of all the property given," and, in a later portion of the decision, that it was the intention of the testatrix that, if the son died "leaving issue living at his death, he might dispose of what remained by will, or that, leaving no will, it should descend to his heirs." This language implies that one who, without holding an absolute fee simple has an absolute power of disposing of property during his life, may dispose by will of what remains at his death. Certainly there is nothing in these cases which should make us hesitate to hold that the testator intended to give his wife the power of disposing by will of the property which he left for her to dispose of as she might deem expedient.

In the opinion of a majority of the court, the entry must be,
Judgment for demandants reversed, and judgment to be entered for the tenant.

CHARLES A. BISHOP *vs.* FRANK H. EATON.

Suffolk. March 13, 1894. — June 19, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Guaranty — Acceptance of Guaranty — Notice to Guarantor — Discharge of Guarantor.

Where the plaintiff signed the promissory note of H. as surety, relying upon a promise contained in a letter to him from the defendant saying, "If H. needs more money let him have it, or assist him to get it, and I will see that it is paid," and looked to the defendant solely for reimbursement if called upon to pay the note, he was authorized by the letter in relying upon the defendant as a guarantor.

An offer as a guaranty becomes effective as a contract upon the doing of the act specified in the offer, and the doing of the act constitutes the acceptance of the offer and furnishes the consideration.

Ordinarily there is no occasion to notify a guarantor of the acceptance of an offer of guaranty, for the doing of the act specified in the offer is a sufficient acceptance; but when the guarantor would not know of himself from the nature of the transaction whether the offer had been accepted or not, he is not bound without reasonable notice of the acceptance seasonably given after the performance which constitutes the consideration.

If notice of the act which constitutes an acceptance of an offer of guaranty is necessary, the implication is that it shall be given in a reasonable way, depending upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings in regard to the matter, and if they are so situated that communication by letter is naturally to be expected, the deposit of a letter in the mail is all that is necessary, though the letter may not be received by the guarantor.

A surety upon a promissory note who relies upon the guaranty of a third person for reimbursement is not required, after payment of the note, to attempt to collect the money from the maker, and it is no defence in an action on the guaranty that he did not promptly notify the guarantor of the default of the maker, at least in the absence of evidence that the guarantor was injured by the delay.

The guarantor of a surety upon a promissory note is discharged from liability if, at the maturity of the note, the time for its payment is extended without his consent, unless he subsequently assents to the extension and ratifies it.

CONTRACT, on a guaranty. Writ dated February 2, 1892. Trial in the Superior Court without a jury, before *Braley, J.*, who found the following facts.

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In Decem-

ber, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22, 1891.

The defendant requested the judge to rule: 1. The letter of the defendant constituted in law no more than an offer of guaranty. 2. The defendant did not become bound by a contract of guaranty unless it appeared from a preponderance of the evidence that, within a reasonable time after his offer was accepted and acted upon, he had notice of such acceptance, and the giving of credit thereon. 3. The mere deposit in the mail of a letter accepting an offer of guaranty which has been made by mail, such letter being properly stamped and addressed to the party making the offer, and mailed within a reasonable time after the acceptance, does not in law constitute such notice to the latter as thereupon to bind him. 4. The defendant did not become bound by a contract of guaranty, if at all, unless he actually received such letter of acceptance. 5. A delay for two years and a half after accepting and acting upon an offer of

guaranty to give notice to the person making the offer is an unreasonable delay. 6. If within a reasonable time after the plaintiff's acceptance and action upon the offer of guaranty, the defendant had notice thereof, then the obligation by which he became bound was not an original promise, but an undertaking collateral to the debt of the maker of the note and within the statute of frauds, and was in substance a promise or obligation that if the plaintiff as surety upon the note was obliged to pay it at maturity through the default of the maker, and if further the plaintiff, after due notice to the defendant of the default, used due diligence in attempting to collect from the maker the sum so paid, and gave due notice to the defendant of his failure so to collect, then the defendant would repay the plaintiff what he had paid out. 7. If for a year and a half after the maturity of the note and the default of payment by the maker, the defendant had no notice of the default, he was discharged from his contract unless he subsequently waived his rights arising from the plaintiff's laches. 8. The extension of time for the payment of the note given at its maturity without the knowledge or consent of the defendant discharged him from his contract unless subsequently with a full knowledge of the facts he assented to and ratified the same. 9. The conversation between the parties in August, 1889, was too equivocal to constitute a ratification of a prior contract, or a waiver of the defendant's rights arising from the laches of the plaintiff. 10. After paying the note the plaintiff did not use due diligence in trying first to collect from the maker the amount he had paid on the note, and hence he cannot recover in this action. 11. After payment of the note the plaintiff did not within a reasonable time notify the defendant of the payment by him, and the default of the maker, and so the plaintiff cannot recover in this action.

The judge declined so to rule, and ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.

F. G. Cook, for the defendant.

R. W. Light, for the plaintiff.

KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent

contract or a guaranty. The judge found that the plaintiff signed the note relying upon the letter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise, the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, might look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other person as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion, that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the

faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. *Babcock v. Bryant*, 12 Pick. 133. *Whiting v. Stacy*, 15 Gray, 270. *Schlessinger v. Dickinson*, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject matter and from their course of dealing, the rights of the parties are fixed, and a failure

actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defence that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in *Vinal v. Richardson*, 13 Allen, 521, after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. *Chace v. Brooks*, 5 Cush. 43. *Carlin v. Savory*, 14 Gray, 528. The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence if he had considered it, we have no means of knowing.

Exceptions sustained.

THOMAS HENNESSY vs. CITY OF BOSTON.

Suffolk. May 18, 1894. — June 19, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Employers' Liability Act.

At the trial of an action for injuries occasioned by the caving in of the side of a sewer trench which was thirty or forty feet long, twelve or fifteen feet deep, three feet wide at the top and one and a half feet wide at the bottom, where the plaintiff was at work, there was evidence tending to show that there was no bracing in the trench except two blocks consisting of portions of earth about four feet wide left untouched, so as to form braces which were about twenty-five feet apart; that there was no unexpected or extraneous cause for the caving in of the earth, and that the accident seemed to have resulted from natural causes; that there was a foreman in charge of the work, whose sole or principal duty in the service of the defendant was that of superintendence, which included the duty of taking proper precautions for the safety of the men at work in the trench; and that the plaintiff was a person of experience in digging trenches, whose duties did not require him to study the conditions affecting the stability of the earth at the sides of the trench, or to do anything except to work under the directions of the foreman. *Held*, that the evidence should have been submitted to the jury, who could have properly inferred that the foreman in charge of the work was negligent, and that the plaintiff was in the exercise of due care.

TORT, under St. 1887, c. 270, for personal injuries occasioned to the plaintiff, while in the employ of the defendant, by the caving in of the side of a sewer trench in which he was at work. Writ dated December 31, 1890.

Trial in the Superior Court, before *Maynard, J.*, who, at the request of the defendant, ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

C. W. Cushing, for the plaintiff.

S. H. Hudson, for the defendant.

KNOWLTON, J. The plaintiff was injured from the caving in of the side of a sewer trench in which he was working, and which was thirty or forty feet long, twelve or thirteen feet deep, three feet wide at the top and about one and a half feet wide at the bottom. There was evidence tending to show that the foreman in charge of the work was a person whose sole or

principal duty in the service of the defendant was that of superintendence. It was his duty to take proper precautions for the safety of the men at work in the trench. He should have observed carefully the character of the soil, and all other conditions which would enable him to determine what should be done to prevent such accidents as that which happened to the plaintiff. It appears that there was no bracing in the trench, except two blocks about twenty-five feet apart. These blocks were portions of earth about four feet wide, which were left untouched so as to form braces. So far as appears there was no unexpected or extraneous cause for the caving in of the earth, and the accident seems to have resulted from natural causes. The jury might well have believed from the evidence, that, if the foreman had exercised such skill and foresight as men of ordinary ability and experience in charge of such a work are accustomed to use, the accident would not have happened. It was an accident of a kind that is commonly preventable by the exercise of ordinary care, and the accident itself, in connection with the circumstances shown in regard to the depth of the trench and the slope of its sides, and the distance of the braces from each other, furnishes evidence from which the jury might have found negligence on the part of the foreman in charge of the work. *White v. Boston & Albany Railroad*, 144 Mass. 404.

The question whether the plaintiff was in the exercise of due care was also a question of fact for the jury. He was engaged in the performance of his duty in the ordinary way. Although he was a person of experience in digging trenches, it was no part of his duty to study the conditions affecting the stability of the earth at the sides of the trench, nor to do anything except to work as well as he could under the directions of the foreman. While he was bound to use ordinary care to prevent injury, the responsibility for the condition of the trench in regard to safety was primarily upon the foreman, and the plaintiff might well trust something to him in determining whether he could safely work in the trench. We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

JULIA M. BERTIE, administratrix, vs. HIRAM P. FLAGG.

Suffolk. March 20, 1894. — June 20, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Landlord and Tenant — Defective Drain.

A landlord is not liable for a defect in a drain, which, in the course of a tenancy at will, is discovered by him, nor for failing to disclose it to the tenant, if the defect is unknown to the latter.

TORT, by the administratrix of the estate of James C. Bertie, for injuries occasioned to her intestate from the alleged negligent failure of the defendant to repair a defective drain on premises occupied by the intestate as a tenant at will. Writ dated December 27, 1892.

The declaration alleged that on or about September 1, 1887, the plaintiff's intestate became a tenant at will of the house numbered seventy-six Poplar Street in Boston, paying rent therefor at the rate of thirty dollars per month, and that the tenancy continued to the date of his decease; that in the year 1889 the defendant became the owner of the house, and acquiesced in the tenancy of the plaintiff's intestate, and received from him payment of rent; that in the year 1891 the yard of the premises became out of repair and dangerous, and the plaintiff's intestate requested the defendant to repair the same, which he agreed to do; and in the course of the repairs the defendant discovered that the drain of the premises was out of repair and in bad condition, and he was informed that certain specified repairs were needed to put the drain into proper condition, but that he negligently refused to make such necessary repairs, and knowingly directed that the drain be imperfectly repaired, and in fact merely covered up and concealed; that the defendant, knowing the existence of the defective drain, neglected to inform the plaintiff's intestate of the condition thereof and concealed the fact, and, though informed of the condition of the drain and of the danger thereof to the plaintiff's intestate, he neglected to repair the same, and falsely and deceitfully represented to the plaintiff's intestate that the repairs had been prop-

erly made ; that by reason of such negligence on the part of the defendant, the plaintiff's intestate, being ignorant of the condition of the drain, contracted typhoid fever therefrom, and suffered greatly in body and mind up to the time of his decease, and was put to great expense for medicines, medical attendance, and nursing, and was incapacitated for labor ; and that the plaintiff's intestate used due care with reference to the drain, but that the defendant did not use due care.

The defendant demurred to the declaration, and assigned as grounds for the demurrer, that the declaration set forth no cause of action ; that it did not appear that the defendant was under any legal obligation to repair the drain, or that he made any representations in regard to its condition, or made any warranty in respect to the premises ; that it appeared that when the plaintiff's intestate became, as alleged, the tenant of the defendant, the latter had no knowledge of any defects, and concealed nothing at the time ; and that the existence of a defective drain, of itself, is not such a defect as a landlord is bound to disclose to a tenant, even at the time of the letting of the premises.

The Superior Court sustained the demurrer, and ordered judgment for the defendant ; and the plaintiff appealed to this court.

E. C. Bumpus & R. F. Simes, for the plaintiff.

H. G. Allen, for the defendant.

HOLMES, J. The declaration in this case alleges that the defendant was the owner and landlord of a house occupied by the plaintiff's intestate as tenant at will ; that in the course of making other repairs he discovered that the drain was in bad condition and needed certain repairs ; that he neglected to repair it, covered it up, and did not inform the intestate ; and that " by reason of said negligence . . . the plaintiff's intestate, being ignorant of the condition of said drain, contracted typhoid fever " from it. The rest is only coloring. It is not alleged that the landlord undertook to repair the drain and did the work improperly, or that he misled the tenant by any representation on the matter.

It is not argued that a landlord, as such, is bound to make repairs which he has not agreed to make, or to remedy defects

which arise in the course of a tenancy. *McKeon v. Cutter*, 156 Mass. 296. But it is said that the defendant is liable for not disclosing the defect, on the same principle that a man was held liable for letting a dwelling-house known by him to be infected with small-pox without disclosing it, in *Minor v. Sharon*, 112 Mass. 477. See also *Cowen v. Sunderland*, 145 Mass. 363; *Cutter v. Hamlen*, 147 Mass. 471; and *Martin v. Richards*, 155 Mass. 381.

But this defect was an ordinary defect in the drain in use on the premises, and the danger was the ordinary danger from that source. It was discovered in the course of a tenancy at will. We are of opinion that the landlord was under no obligation to repair it, and if we are to take it that the plaintiff was ignorant of the defect as well as of the failure to repair it, notwithstanding the allegation that the defendant "refused" to make the necessary repairs, we are of opinion that he was under no obligation to disclose it.

Demurrer sustained.

JOHN CUMMINGS, administrator, *vs.* WILLIAM B. STEARNS,
administrator, & others.

Suffolk. March 22, 1891. — June 20, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Devise and Legacy — Trust — Vested Interest in an Equitable Contingent Remainder.

After creating a trust by will for the benefit of his children, a testator provided: "Upon the decease of any of my said children, A., B., C., and D., I give . . . that portion of my estate of which the income is above given to him or her for life, to his or her children, their heirs and assigns forever. And if either of them shall die leaving no child or more remote descendant then living, I give . . . such share to the others of said four children in equal shares, their heirs and assigns forever." A. died in 1891, leaving four children. D. died in 1892, unmarried and without issue. *Held*, that the portion of the testator's estate held in trust for D. during life passed to the executor of and trustee under the will of A., and not to A.'s four children.

A vested interest in an equitable contingent remainder is devisable, transmissible, and assignable subject to the contingency upon the happening of which its value depends.

BILL IN EQUITY, filed January 9, 1894, by the administrator *de bonis non* with the will annexed of the estate of William Bramhall, to obtain the instructions of the court as to the construction of the will.*

At the request of the parties, the case was reserved on the pleadings, by *Knowlton, J.*, for the consideration of the full court.

H. N. Shepard, guardian *ad litem*, for the minor children of William T. Bramhall, a son of the testator.

G. A. O. Ernst, for James P. Stearns, executor of and trustee under the will of William T. Bramhall.

KNOWLTON, J. By the codicil of the will of William Bramhall, his son, Robert Bramhall, who died on December 3, 1892, unmarried and without issue, became entitled for life to a share of the income of the trust fund created by the seventh clause of the will, and the eighth clause became applicable to him as if his name had been written therein. *Cummings v. Bramhall*, 120 Mass. 552. This clause is as follows: "Upon the decease of any of my said children, William T., Thomas M., Eliza S., and Maria S., I give, devise, and bequeath that portion of my estate of which the income is above given to him or her for life to his or her children, their heirs and assigns forever. And if either of them shall die leaving no child or more remote descendant then living, I give, devise, and bequeath such share to the others of said four children, in equal shares, their heirs and assigns forever." It gives to each of the children of the testator an equal share of the remainder after the life estate on the death of either of the others, upon the contingency that the deceased child leaves "no child or more remote descendant then living." The persons who are to take this remainder upon the happening of the contingency are the children of the testator mentioned in this clause. The will takes effect to give them their right at the death of the testator; their interest is vested from that time. True it is an interest in a remainder which is contingent. Upon the death of one of the others leaving no child or more remote descendant, it becomes as to his share vested in possession as well as in ownership. The will gives a vested interest in an equitable contingent remainder

* The material provisions of the will may be found in the report of the case of *Cummings v. Bramhall*, 120 Mass. 552.

which may or may not come into possession. There is nothing in the will which indicates that the gift is dependent on the survivorship of the other several devisees after the death of one leaving no issue then living, but the evident intention of the testator was to make a final disposition of the whole estate according to the terms of the will. Such an interest is devisable, transmissible, and assignable, subject of course to the contingency upon the happening of which its value depends. *Winslow v. Goodwin*, 7 Met. 363. *Gardner v. Hooper*, 3 Gray, 398. *Dunn v. Sargent*, 101 Mass. 386. *Merriam v. Simonds*, 121 Mass. 198, 202. *Loring v. Carnes*, 148 Mass. 223.

That part of the estate held in trust which would have passed to William T. Bramhall if he had been living at the time of Robert's death, belongs to William T. Bramhall's estate, and goes to his executor and trustee.* *Decree accordingly.*

ELLA M. BURTIS vs. HOWARD BURTIS.

Suffolk. March 22, 23, 1894. — June 20, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Divorce — Entry of "Without Prejudice" — Jurisdiction — Domicil.

On a libel for divorce it appeared that a former libel between the same parties was dismissed for want of jurisdiction "without prejudice." Held, that, there being no limitation upon the effect of the words "without prejudice," they must be taken to have been used generally, and to mean without prejudice to the right of the libellant to bring a new suit and to try it as if the questions involved were all presented for the first time.

* William T. Bramhall died on April 3, 1891, leaving four children, and a last will, in which he gave the residue of his estate in trust, the same person being named executor and trustee. The question in issue was whether that portion of William Bramhall's estate held in trust for Robert during his life, and which upon Robert's death would have passed to William T. Bramhall, if living, under the eighth clause of William Bramhall's will, now passed upon Robert's death to the executor of and trustee under the will of William T. Bramhall, or to William T. Bramhall's four children.

The theory of law, that husband and wife are one person, and, wherever the wife may be actually, she is constructively with her husband, is not applicable to a wife who remains in a place where she and her husband last lived together after he is gone, and brings a suit against him for a divorce founded on his misconduct while they were together. She may retain her old domicile, acquired when she and her husband were actually abiding in the same place, and is not compelled to follow him to a place where she never lived merely because before she discovered his offence she intended to go there with him; but this exception to the general law of domicile has no application in suits brought by the husband against the wife for her misconduct.

LIBEL, filed on December 8, 1892, by Ella M. Burtis, for a divorce from Howard Burtis, on the grounds of adultery and cruel and abusive treatment.

Trial in the Superior Court, before *Fessenden, J.*, who dismissed the libel for want of jurisdiction; and the libellant alleged exceptions. The facts sufficiently appear in the opinion.

The case was argued at the bar in March, 1894, and afterwards was submitted on the briefs to all the judges.

J. M. Browne, for the libellant.

C. T. Duncklee, (*F. E. H. Gary* with him,) for the libellee.

KNOWLTON, J. The former libel between these parties was dismissed for want of jurisdiction "without prejudice." There being no limitation upon the effect of the words "without prejudice," they must be taken to have been used generally, and to mean without prejudice to the right of the libellant to bring a new suit, and to try it as if the questions involved were all presented for the first time.

The first three paragraphs of the bill of exceptions state facts which must be treated as agreed or established. There are matters referred to in other parts of the bill in regard to which only the evidence is stated, some of which was apparently uncontradicted. The only question of law raised is upon the refusal of the court to rule, for the purposes of the case, that the domicile of the libellant remained in Boston.

There is no dispute that the domicile of both parties was in Boston until the libellee went to Brooklyn in the State of New York, in September, 1891. The libellant did not go there with him. In July, 1891, she went to California to visit her mother, and she remained there until June, 1892, when she returned to Boston. Her absence was for a temporary purpose, and there is no evidence which would warrant a finding that she acquired a

domicil in California. Upon the undisputed facts, her domicil remained in Boston, unless the residence of her husband in Brooklyn while she was in California, and before she knew of his adultery,* and while she expected to return and live with him, worked a change of her domicil. Undoubtedly it would have had that effect except for his offence, and for her determination, when she discovered it, to take advantage of her legal right to proceed against him for a divorce. The change would have come, not because she personally changed her place of abode, but because in the theory of law husband and wife are one person, and, wherever the wife may be actually, she is constructively with her husband. But this theory or fiction is not applicable to a wife who remains in a place where she and her husband last lived together after he has gone, and brings a suit against him for a divorce founded on his misconduct while they were together. It would be unjust to apply this theory against a woman who is seeking a divorce for a wrong inflicted on her by her husband. In order to obtain her rights under such a rule of law, she might be obliged to follow her husband as often as he migrated, even to the ends of the earth. The American doctrine that a wife may have a separate domicil from her husband when she seeks a divorce on account of a wrong inflicted upon her is therefore well established, but the precise limits of it have never been settled by actual adjudication in this Commonwealth. In some of the cases there are statements which imply that, from the time of a delictum which would justify the wife in leaving her husband, she should be treated as a person who has a right to fix her own domicil, and the husband should not be permitted to assert this fiction of law against her. It may be argued with much force, that, if she proves the wrong as she alleges it, she

* The bill of exceptions recited that her first information of her husband's adultery was in December, 1891, while she was in California; that she refused to again live with her husband, and so informed him by letter in March, 1892; that within five days after she returned to Boston, in June, 1892, she filed her libel for divorce, in which she alleged that the libellee was a resident of Brooklyn in the State of New York; that the libel was dismissed for want of jurisdiction "without prejudice"; that immediately thereafter she filed a second libel for divorce, in which she alleged that the libellee was a resident of Boston, and that when she came from California to Boston she intended "getting a separation from her husband."

thereby establishes a right to be emancipated from her husband from the time of the commission of the wrongful act, and a right to be free from the thralldom of this theory of law, and to claim a domicile for herself according to the fact as shown by her personal residence. If § 5 of Pub. Sts. c. 146, applies to a libel brought by a wife as well as to a libel brought by a husband, it seems to recognize the right of a wife to acquire a new domicile if the husband does that which entitles her to a divorce.

But whether this exception to the general rule should be carried so far in favor of a wife as to permit her to acquire a new domicile before she brings a suit for a divorce is a question which we have no occasion to decide in this case, and upon which we express no opinion. It is enough for the purposes of the present libellant to say that she has a right to retain her old domicile, acquired when she and her husband were actually abiding in the same place, and that she is not compelled to follow him to a place where she never lived merely because, before she discovered his offence, she intended to go there with him.

In *Harteau v. Harteau*, 14 Pick. 181, the subject is discussed at length by Chief Justice Shaw, and conclusions are reached which fully cover this case. He says, among other things, "Suppose a husband commits adultery and then purchases a house and actually takes up his domicile in another State, but before his wife has joined him she is apprised of the fact, and immediately files a libel for divorce, . . . it would be difficult to say that she is not entitled to have a divorce here." In *Brett v. Brett*, 5 Met. 233, 235, Mr. Justice Dewey cites this case with approval and affirms the general doctrine. In *Shaw v. Shaw*, 98 Mass. 158, 161, Mr. Justice Foster says, "After the delictum was committed by the husband which caused the wife to separate herself from him and justified her in doing so, no subsequently acquired domicile of his could draw after it hers and change it so as to deprive the courts of Massachusetts of their jurisdiction to grant a divorce for an offence committed while the domicile of both remained in this Commonwealth." Well considered cases in other jurisdictions go further than is necessary to sustain the position of the libellant in the present case. *Cheever v. Wilson*, 9 Wall. 108, 123. *Ditson v. Ditson*, 4 R. I. 87, 107. *Harding v. Alden*, 9 Greenl. 140. See also Bish. Mar., Div. & Sep. §§ 112

to 121. 2 Kent Com. 110, note. 5 Am. & Eng. Encyc. of Law, 755, 756, and cases cited.

It is to be noticed that this exception to the general law of domicile is applied to prevent injustice only in cases where the wife brings a suit for divorce founded on the husband's wrong. It has no application in suits brought by the husband against his wife for her misconduct. In such cases there is no reason why the general rule should not apply, and the numerous decisions stating the general rule in those suits are not in conflict with the others which state the exception.

In the present case all the hardship and injustice would follow which the exception was intended to prevent, if the wife were obliged to go to the State of New York to pursue her remedy in a jurisdiction where she is a stranger. A majority of the court are of opinion that the entry should be

Exceptions sustained.

JAMES CAHILL vs. AMELIA W. HALL.

Suffolk. March 23, 1894. — June 20, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Authority of Borrower to bind Lender for Keep of Horse.

A person who lends a horse to another without more does not authorize the borrower to make him answerable for its keep or improvement.

CONTRACT, for the board and expense of shoeing a horse. Writ dated March 15, 1892.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows:

In 1886 the defendant, who was the owner of a mare called Mayflower, said to her son, "You take Mayflower and keep her until I call for her." Her son thereupon took possession of the mare, and kept it until its death in 1889, and paid the expense of keeping it. In 1888 the defendant's son, without her knowledge, raised a colt from the mare, and in 1890, with-

out her knowledge or consent, employed the plaintiff to keep and train the colt for a carriage horse, agreeing to pay him therefor five dollars a week and the expense of shoeing. The defendant never had possession of the colt, and never gave any directions to her son regarding it, but after its birth she learned of the fact, and frequently saw it in the possession of her son.

The plaintiff kept the colt for thirty-four weeks, and expended eight dollars for shoeing, and rendered a bill therefor to the defendant's son. The defendant prior to the commencement of this action had no knowledge of the contract of her son with the plaintiff.

S. W. Harmon, for the plaintiff.

S. L. Powers, for the defendant.

HOLMES, J. Whether the colt belonged to the defendant or to her son, the son had possession of it for his own benefit. Putting the case in the strongest way for the plaintiff, the defendant did no more than to lend the colt to her son. She did not know of the contract with the plaintiff. Her son did not purport to contract on her behalf, nor did the plaintiff rely upon any supposed authority from her, or render the services on her credit. When one person lends a horse to another without more, he does not authorize the latter to make him answerable for its keep or improvement. See *Storms v. Smith*, 137 Mass. 201; *Howes v. Newcomb*, 146 Mass. 76, 80. Possession alone is no more ostensible authority to bind the owner for keeping and training than it is to sell, apart from statute. Even if circumstances could be imagined under which, without an actual knowledge of the owner, consent might be implied sufficient to create a lien under Pub. Sts. c. 192, § 32, (*Lynde v. Parker*, 155 Mass. 481,) there is nothing in this case which would warrant the finding of an actual contract binding on the defendant. There is equally little ground for charging her upon a fictitious or quasi contract. The plaintiff furnished his services under a valid contract with the son, and must look to him.

Judgment for the defendant.

FRED JOY vs. ELLEN C. METCALF.

Middlesex. May 18, 1894. — June 20, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Contract — Maintenance and Champerty — Compensation of Purchaser of Property — Evidence.

A contract which contemplates merely a purchase of property, and provides that the services of the purchaser, who is an attorney at law, shall be paid for by giving him a share of the profits to be made by the purchase, is not champertous; and a question to the plaintiff whether he had released his interest in the property to the defendant was rightly excluded, if the plaintiff disclaimed all interest in it, and all the evidence showed that he had no interest, and that there was no question upon that point before the court.

KNOWLTON, J. This was an action to recover for services rendered by the plaintiff to the defendant. The only question is whether the contract on which the plaintiff seeks to recover is void, as being against public policy and champertous.

The defendant was guardian of her mother, who was an insane person, and after her mother's decease she had in her hands \$43,654.78 in quick assets which belonged to her mother's estate. She and her sister, who were the only heirs at law of her mother, were not on good terms, and had not seen each other or had any dealings with each other for a long time. There was a controversy as to the person to be appointed administrator of her mother's estate, and with a view to put an end to the controversy she applied to the plaintiff, who was an attorney at law, to visit her sister, who lived in New Jersey, and try to buy her share of the estate; and she agreed to give him for his services one half of what he could save by the purchase. He made the purchase, and thereby saved \$2,500. The evidence indicates that this purchase was made fairly, and after a full disclosure of the amount in the hands of the defendant as guardian. It is to be presumed that the sister was willing to make the sale on these terms for the sake of avoiding controversy, and the expense and delay of litigation, and for the sake of obtaining her share in money immediately, instead of waiting

two years after the appointment of an administrator for distribution of the balance which would then be due.

We see nothing champertous in the contract between the plaintiff and the defendant. It was not entered into for the purpose of promoting litigation, and it was free from the objections on which the law against champerty is founded. It contemplated merely a purchase of property, and provided that the services of the purchaser should be paid for by giving him a share of the profits to be made by the purchase. It was in its nature a commercial transaction, as distinguished from an attempt at litigation, and in such transactions payment for services by a commission or by a share of the profits is unobjectionable.

Maintenance is defined by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it," and champerty is said to be a species of maintenance. 4 Bl. Com. 134, 135. It is of the essence of the offence that there should be a suit or an antagonistic proceeding between parties in which assistance is to be rendered in the litigation. Here the service called for by the contract was of a different kind. It looked solely to a compromise and termination of the controversy. All the reasons relied on in *Manning v. Sprague*, 148 Mass. 18, for holding that the contract was not champertous, exist in this case, and there are others which make the case much stronger for the plaintiff than that case was.

The question whether the plaintiff had released his interest in the estate to the defendant was rightly excluded, because he disclaimed any interest in it, and all the evidence in the case showed that he had no interest, and that there was no question upon that point before the court. The rulings at the trial were correct.

Exceptions overruled.

J. Bennett & C. Abbott, for the defendant.

T. E. Grover, for the plaintiff.

GUSTAF A. HOLST vs. JOSEPH I. STEWART & another.

Suffolk. May 18, 1891. — June 20, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Deceit — Fraudulent Representations — Evidence — Pleading — Counts in Contract and Tort — Verdict — Exceptions — Judgment — Agency — Partners as Joint Tortfeasors.

A false statement as to the frequency of the arrival and departure of railroad trains at different hours of the day at a certain railroad station in the vicinity of Boston, made as an inducement to purchase property near that station, has such a relation to the value of the property as to be the subject of a fraudulent representation.

In an action for false and fraudulent representations the declaration alleged that the defendant, to induce the plaintiff to purchase a farm near a railroad station in the vicinity of Boston, made false and fraudulent representations to him regarding the frequency of the running of trains between that station and Boston at different hours of the day; that the plaintiff believed the representations to be true, and was thereby induced to purchase the farm. *Held*, on demurrer, that the times of the running of railroad trains was not a matter so easily ascertainable, under all circumstances, as never to be the subject of a fraudulent representation.

In an action for false and fraudulent representations the circumstances under which the representations were made need not be set out in the declaration.

In an action for false and fraudulent representations it appeared that the defendant when he made them was acting as agent of the plaintiff. *Held*, that in a relation of confidence the plaintiff would be warranted in relying on the assertions of the defendant, when he would not if the defendant were representing only an adverse interest.

At the trial of an action for false and fraudulent representations it appeared that the plaintiff, who was a native of Sweden, and spoke English imperfectly, took a train in Boston with the defendant to go to N. S. to look at a farm there with a view to purchasing it; that while in the car waiting for the train to start, the defendant, in response to an inquiry of the plaintiff, undertook to find out for him in regard to the running of the trains between Boston and N. S.; that the defendant went out of the car, procured a time table, and, returning, looked at it, and falsely represented that a train left N. S. at 5.50 in the morning; that when he made the statement he professed to be reading from the time table, and after he had finished reading from it he put it in his pocket; that later he looked at it again, and stated falsely that there were many trains from Boston to N. S. in the evening; and that the plaintiff exchanged his property in another place for the farm in N. S., the defendant acting as his broker in effecting the exchange, and receiving a commission from the plaintiff for his services. *Held*, that under these circumstances it could not be said, as matter of law, that the plaintiff was so careless in trusting the defendant that he should be precluded from recovering for the fraud practised upon him in regard to the running of the trains.

In an action of tort for false and fraudulent representations with a count in contract for money had and received, to which is annexed a bill of particulars claiming for cash paid "by mistake and under misapprehension of facts at the time of the conveyance," etc., evidence may be introduced under that count which will warrant a recovery, and in the absence of a motion for further particulars the count will be considered sufficient.

At the first trial of an action in the Superior Court the presiding judge ruled that the action could not be maintained on one of the counts of the declaration, and submitted the case to the jury upon another count, upon which a verdict was returned for the plaintiff, and the defendant alleged exceptions, which were here sustained. To the ruling on the first count the plaintiff alleged exceptions, which were allowed, but were never entered in this court. On motion of the defendant, after the former decision in this court, and after the plaintiff had amended his pleadings, the Superior Court dismissed the plaintiff's exceptions, but refused to affirm the ruling upon the defective count. *Held*, that the refusal was right, as there was no judgment of the Superior Court to affirm.

In an action for false and fraudulent representations a special finding of the jury that the defendants were partners renders immaterial any question as to the sufficiency of the evidence to warrant an instruction in regard to a possible combination or conspiracy of the defendants.

An exception of the defendant to a refusal of the presiding judge to rule that the action cannot be maintained on a given count of the declaration will not be sustained when the bill of exceptions recites that there was evidence tending to prove that count, and nothing appears to show that there was error in submitting it to the jury.

Where the declaration contains a count in contract and another in tort, and both are alleged to be for the same cause of action, it is error for the jury to return a verdict for the plaintiff on both counts, and in such a case the plaintiff, as a condition of taking judgment on the finding, should be required to remit his verdict on one of the counts, and the judgment should then be rendered on the other.

TORT, in five counts, for false and fraudulent representations, with a count in contract. Writ dated August 19, 1889.

At the trial, the plaintiff waived his claim under all the counts except the second and third.

The second count of the declaration, amended after the former decision in this case, reported 154 Mass. 445, by the addition of the words enclosed in brackets, alleged that the plaintiff purchased of Sarah C. Saunders a tract of land situated in North Stoughton, and conveyed to her his estate in Everett, and paid to the defendants, who were acting as his agents, three hundred and fifty dollars in cash and his note for thirty-seven dollars; that the defendants, to induce him to purchase the land of Saunders, and to convey to her his estate in Everett, and to pay them the money and give the note, falsely [and fraudulently] represented to the plaintiff that the railroad

trains took aboard passengers at and left the depot in North Stoughton nearest to the land in question for Boston every week day at 5.50 of the clock in the morning, and lots of times out from Boston stopping at North Stoughton in the evening ; that the plaintiff, believing that the representation was true, was thereby induced to purchase the land of Saunders in North Stoughton, and to convey to her his estate in Everett, and to pay to the defendants three hundred and fifty dollars in cash, and to give his note for thirty-seven dollars ; that in truth and in fact the railroad trains did not, and since then have not, taken on board passengers at and left the depot in North Stoughton for Boston every week day at 5.50 of the clock in the morning, and there have not been lots of trains out from Boston which stopped at North Stoughton in the evening, [which the defendants well knew,] and there were no trains from Boston between 6.07 P. M. and 11.10 P. M. So that the plaintiff was prevented from getting to and from his work in Boston without great additional expense and loss of time, and was compelled to keep a horse and wagon therefor.

The third count was for money had and received, with a bill of particulars claiming \$200 for cash paid "by mistake and under misapprehension of facts at the time of the conveyance to me by Sarah C. Saunders" of the land in North Stoughton. Answer, as to both defendants, a general denial.

The defendant Ezra F. Pratt also demurred to the declaration, and assigned as grounds of demurrer that the declaration set forth no cause of action ; that the representations therein set forth were not fraudulent or actionable ; that the representations alleged in the second count of the declaration were mere matters of opinion, lying as much within the knowledge of the plaintiff as of the defendant, and ought not to have misled the plaintiff, and therefore were not actionable ; and that the bill of particulars annexed to the third count of the declaration was not such as entitled the plaintiff to recover.

The Superior Court overruled the demurrer ; and the defendant Pratt appealed to this court.

At the trial in the Superior Court before *Sherman, J.*, evidence was offered in support of the second count, tending to show that the plaintiff, in 1888, owned an estate in Everett,

where he lived ; that he worked in Boston as an engineer, and that his hours of work were from seven o'clock in the morning until six o'clock at night ; that in July, 1888, he saw an advertisement in a newspaper of a small farm near Boston for sale or exchange ; that subsequently, at the request of the defendant Stewart, he agreed to go to North Stoughton to look at the farm, which was in the hands of the defendants, for sale or exchange ; that he then supposed that the defendants were real estate brokers, and were acting as such for one Saunders, the owner of the farm ; that on August 2, 1888, in pursuance of their arrangement, the plaintiff and the defendant Pratt went to North Stoughton to look at the farm ; that while they were waiting in the railway car for the train to start from Boston the plaintiff asked Pratt if he could have a train at North Stoughton in the morning so that he could reach his work in Boston at seven o'clock ; that Pratt replied, " I can easily find that out," and went out of the car and procured a time table, and, returning, looked at the time table and said, " You can have a train in the morning at ten minutes of six, will that give you time enough to get in ? " and that the plaintiff replied, " That will give me plenty of time," after which Pratt, who professed, when he made the statement regarding the running of the train, to be reading from the time table, put the time table in his pocket ; that later, as the plaintiff testified, Pratt again examined it and said, " The train leaves North Stoughton at ten minutes of six in the morning, and lots of trains out at night " ; that the plaintiff believed that the representations made by Pratt were true ; that he relied upon them, and was induced thereby to exchange his estate in Everett for the farm in North Stoughton ; that he was born in Sweden, and understood English imperfectly ; and that he had no other knowledge of the running of railroad trains between Boston and North Stoughton, and made no attempt to obtain any other information, but relied upon Pratt's statements.

There was evidence tending to show that the defendants were copartners, and that they acted as brokers for the plaintiff, who paid them a commission for effecting the exchange of property.

It also appeared that a train did not leave North Stoughton at ten minutes of six in the morning, and that there were not " lots of trains out at night."

The defendants denied making any intentionally false representations, and Pratt testified that he simply read from the time table what he saw, or thought he saw, written on it. They also offered evidence tending to show that the plaintiff knew about the running of railroad trains between Boston and North Stoughton, and to show that they were not acting as brokers for the plaintiff.

There was also evidence tending to prove the third count.

The defendants requested the judge to rule: 1. that, upon all the evidence, the plaintiff is not entitled to recover upon the second count in his declaration; 2. that the alleged representations set out in the second count of the plaintiff's declaration are matters of opinion or information equally available to all the parties, and therefore not actionable; 3. that the plaintiff cannot maintain his action upon the third count.

The judge refused so to rule, and the defendants excepted.

The defendant Stewart requested the judge to rule that the plaintiff could not recover against him upon the second count, unless the jury found that he and Pratt were partners, and that the representations were made within the scope of the partnership business.

The judge instructed the jury on this point substantially as requested, and further instructed them that, if the defendants were partners, and were in the transaction together, then one was liable for the conduct of the other; if they were partners in making the sale, and one of them was allowed to make it, both were responsible for whatever he did to consummate it; if they were not partners, they were liable only provided they put up the scheme together; that the plaintiff contended that there was a scheme on the part of the defendants to defraud him, and that they did it in concert, in other words that it was a conspiracy, and that they undertook to get the two hundred dollars by a system of falsehoods, and that the representation was a part of the scheme; that if the jury should find that the defendants undertook to get the money fraudulently, and intended to cheat the plaintiff if they could, and by any means they could, each of them would be liable for whatever was done by the other in furtherance of such an undertaking, although they were not partners; and that if they

were not partners, and one was acting honestly, only the one who committed the fraud would be liable.

The judge submitted the question whether or not the defendants were partners to the determination of the jury, who answered the question in the affirmative, and returned a verdict for the plaintiff for two hundred dollars on each count; and the defendants alleged exceptions.

At the first trial of this case, the judge, at the close of the evidence for the plaintiff, ruled that the action could not be maintained upon the first and third counts of the declaration. The case was submitted to the jury on the second count, and a verdict was returned for the plaintiff. The defendants then alleged exceptions, which were afterwards sustained in this court. See 154 Mass. 445. To the ruling upon the first and third counts the plaintiff alleged exceptions, which were filed and allowed, but were never entered in this court. Thereafter the defendant Pratt, in November, 1891, in the Superior Court, before *Dewey, J.*, moved to dismiss the exceptions, and to affirm the judgment of the Superior Court. The judge dismissed the exceptions, but refused to affirm the alleged judgment, upon the ground that no judgment had been rendered; and the defendant Pratt alleged exceptions.

B. C. Moulton & V. J. Loring, (E. D. Loring with them,) for the defendant Pratt.

F. A. Perry, for the plaintiff.

KNOWLTON, J. This case comes before us on an appeal from an order of the Superior Court overruling the defendant Pratt's demurrer to the declaration, on a bill of exceptions to the refusal of the court to order a judgment for the defendants upon the first and third counts, on the dismissal of the plaintiff's exceptions after the first trial, and on a bill of exceptions to certain rulings and refusals to rule at the last trial.

At the last trial the plaintiff waived his claim under all the counts except the second and third, and the demurrer to these two counts is all that is material under the defendant Pratt's appeal. * Since the former hearing of the case in this court (see 154 Mass. 445) the second count has been amended, and the defects in it which were then pointed out have been remedied. The objections which are principally urged against it in its

present form are, first, that the running of the railroad trains between North Stoughton and Boston was not a matter affecting the value of the farm so directly that it could be the subject of a fraudulent representation, and, secondly, that it was a subject in regard to which the plaintiff had ample opportunity to obtain information for himself, and that he had no right to rely on the representations of the defendants.

As to the first objection, it seems clear that the proximity of a dwelling-house to a railroad station in the vicinity of Boston is a matter which tends greatly to affect the value of the property. It is ordinarily one of the first subjects to attract the attention of a purchaser. The frequency of the arrival and departure of trains at different hours of the day is as much to be considered as the existence of the railroad. We have no doubt that this was a matter which had such a relation to the value of the property that it might be the subject of a fraudulent representation.

The most difficult question in the case grows out of the fact that the subject of the misrepresentations was one of which the plaintiff easily might have obtained information from other sources. This question arises on the demurrer, and in a slightly different form on the bill of exceptions taken at the trial.

It has often been held, in general terms, that one bargaining with another must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties. If he fails to do this he cannot maintain an action of deceit for the misrepresentation of them. *Salem India Rubber Co. v. Adams*, 23 Pick. 256. *Brown v. Leach*, 107 Mass. 364. *Poland v. Brownell*, 131 Mass. 138. But in the application of this rule, the circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable negligence as should preclude him, under a general rule of public policy, from having a remedy against one who has fraudulently abused his confidence. It has been held that one may recover for false representations of facts which he could have ascertained by an examination of records in the registry of deeds; *Grimes v. Kimball*, 3 Allen, 518, 523; and that one buying a large number of carpets in a furnished house may take the seller's statement of their meas-

urement, although he could easily measure them for himself. *Lewis v. Jewell*, 151 Mass. 345. Looking first at the demurrer, we are of opinion that the allegations of the second count are sufficient. It is charged that the defendants, to induce the plaintiff to purchase, falsely and fraudulently made these representations in regard to the running of trains, and that the plaintiff believed them to be true, and was thereby induced to purchase. It cannot be said that the times of the running of railroad trains is a matter so easily ascertainable by all persons under all circumstances that it can never be the subject of a fraudulent representation. The allegation is that it was made the subject of a fraud in this case. The circumstances are not set out in the declaration, and need not be. Moreover, it is alleged that the defendants were acting as agents of the plaintiff, and in a relation of confidence the plaintiff would be warranted in relying on their assertions, when he would not be if they were representing only an adverse interest.

If we consider in this connection the exception taken at the trial to the refusal to direct a verdict for the defendants on this count, we find that the plaintiff was a native of Sweden, who spoke English imperfectly; that Pratt, one of the defendants, while they were in a railway car waiting for the train to start for North Stoughton to look at the farm, undertook to find out for the plaintiff in regard to the running of trains, and went out of the car and got a time table, and after his return looked at it, and made the false representations for which this action is brought. The testimony was that he professed to be reading from the time table when he made the statement, and that when he had finished reading from it he put it in his pocket. It appeared that the plaintiff exchanged his real estate in Everett for this farm, and there was evidence that the defendants acted as his brokers in making the exchange, and that they were paid a commission by him for their services. Under these circumstances we cannot say, as matter of law, that the plaintiff was so careless in trusting Pratt that he should be precluded from recovering for the fraud practised upon him in regard to the trains. We are of opinion that the ruling on the demurrer to this count, and the rulings at the trial, were correct.

The third count was in the ordinary form for money had and

received, with a bill of particulars claiming for cash paid "by mistake and under misapprehension of facts at the time of the conveyance," etc. Under this count evidence might be introduced which would warrant a recovery, and in the absence of a motion for further particulars we are of opinion that the count was sufficient, and that the demurrer was rightly overruled. *Hayes v. Wilson*, 105 Mass. 21.

After the first trial, and before the last, the defendant Pratt took an exception to the refusal of the judge to "affirm the judgment of the Superior Court" upon the first and third counts, at the time of allowing his motion to dismiss the plaintiff's exceptions to the rulings on these counts, for failure to enter the exceptions in the Supreme Judicial Court. The refusal was right. There was no judgment of the Superior Court to affirm. There was merely a ruling at the first trial that the plaintiff could not recover on these two counts, and at the same time there was a verdict for the plaintiff on the second count, and a bill of exceptions filed by the defendants, which was afterwards sustained in this court. On the order for a new trial all matters were open, and the plaintiff availed himself of his right to file motions to amend his pleadings, and the motions were allowed.

There remain for consideration two or three questions raised by the exceptions taken at the last trial. It is now immaterial whether there was evidence to warrant the instruction given in regard to the possible combination or conspiracy of the defendants, for the jury found specially that they were partners, and they were therefore both holden for what was done by either of them in the transaction of the partnership business.

The defendants requested the court to rule that the action could not be maintained on the third count. But the bill of exceptions recites that there was evidence tending to prove this count, and nothing appears to show that there was error in submitting it to the jury. *Dana v. Kemble*, 17 Pick. 545. *Boston & Worcester Railroad v. Dana*, 1 Gray, 88.

There appears to be an error in the return of the verdict for the plaintiff on both of these counts. One count was in contract and the other in tort, and they are alleged to be for the same cause of action. Counts in contract and in tort cannot be

joined in the same suit unless they are for the same cause of action. The jury should have been instructed that, if they found for the plaintiff on one count, they should find for the defendant on the other. The finding was for the plaintiff for \$200 on each count. No motion appears to have been made and no exception taken in regard to this error of the jury. If we interpret the record correctly, the plaintiff, as a condition of taking judgment on the finding, should be required to remit his verdict on one of these counts, and the judgment should then be rendered on the other. But as statements in different parts of the record are somewhat indefinite and confusing, we leave this part of the case for further proceedings in the Superior Court.

Exceptions overruled.

ELLIOTT H. PEABODY, administrator, *vs.* ALBION S. NORTH.

Worcester. March 2, 1894. — June 21, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Contract — Statute of Limitations — Guardian and Ward — Payments pro tanto on Claim for the Price of Land — Inferences of Fact to be drawn from agreed Facts.

A., who in 1882 was appointed guardian of F. and continued as such until his death in 1888, sold, under license of Probate Court, certain premises in 1883 to N., and N. gave A. in payment two promissory notes. The sale being void, no conveyance was made, and seven months later A. legally sold the premises again to N. No new notes were given, nor any payments made, nor any understanding had as to payment. In December, 1888, A. executed a deed to N., which was not delivered until after suit brought. Save as may hereinafter appear no payments were ever received from N. on account of the notes which remained in A.'s possession until February, 1891, and during such possession no indorsements were made thereon, and except as hereinafter stated no payments were applied by A. or the plaintiff, P., to the account against N. A. sued N. upon the notes and an account annexed, the writ being dated July 20, 1890. In February, 1891, A. indorsed the notes to P., the administrator of F., and P. sued out his writ in the present action, dated February 16, 1891, against N., who set up among other defences the statute of limitations. No payments upon the notes or account were ever made by N. to P., except as may be inferred from the facts herein referred to. Before the first sale A. desired N. to pur-

chase the premises and take care of his ward, F., agreeing that charges, etc. should go towards the price to be paid by N. for the premises, but no understanding was had after the first or second sale except as it might be inferred to continue. N. took possession, claiming to be owner, and took care of F. until his death. No accounting was ever had with A., but a certain amount was expended by N., as appeared in a suit by N. against A. The last named credited himself in his account as guardian with a portion of the sum due N. under the arrangement. The judge, who was to draw from the agreed facts any inferences of fact which might legitimately be drawn therefrom, found for the plaintiff. *Held*, that the judge might well find that the defendant agreed to treat the sum which should reasonably become due to him for care and maintenance before he should pay for the land as a payment toward the price of the land, and he might give credit accordingly upon the plaintiff's claim, and thus avoid the defence of the statute of limitations.

CONTRACT. The declaration was upon two notes, one for \$1,600 and the other for \$100, both being on demand, to the order of Aaron O. Wilder, guardian of Fanny G. North, with interest at the rate of six per cent per annum. The declaration also contained a count on an account annexed for \$1,700, for the purchase price of a farm, with interest amounting to \$786.53, making \$2,486.53, less a credit of \$840 for board of Fanny G. North until her death, on January 30, 1888, leaving a balance due of \$1,646.53. The defendant set up, among other defences, the statute of limitations.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

On October 24, 1882, Aaron O. Wilder of Leominster was appointed guardian of Fanny G. North of Westminster, an insane person, and continued as such until her death, on January 30, 1888. Wilder, acting under a license of the Probate Court, on March 27, 1883, sold certain premises in Westminster to Albion S. North, who bid at the sale the sum of \$4,000. The premises were sold subject to a mortgage for \$2,600. North gave to Wilder in payment for the land the two promissory notes declared upon. The sale was insufficiently advertised, and was treated as void by Wilder and North, and no formal conveyance was made. Wilder proceeded to sell the premises again by public auction, on October 30, 1883, all statutory requirements being fulfilled, and the premises were struck off to North at a price which for the purposes of the agreement was admitted to be \$4,000. No new notes were given and no pay-

ments made on account of the second sale, nor was any agreement made or understanding had as to how or in what manner the premises should be paid for. -On December 5, 1888, Wilder executed a deed of the premises to North, but it was not delivered to North or to his agent until after the bringing of the suit. Save as may appear from facts hereinafter stated, no payments were ever received by Wilder from North on account of the notes, which remained in Wilder's possession until about February 1, 1891, nor so long as they remained in his possession were any indorsements made thereon, nor except as herein stated were any payments of any name or nature made to or applied by Wilder or the plaintiff to the account against North growing out of the first or second sale. Wilder sued North upon the notes, and upon an account annexed for the purchase price, the suit being still pending in the Superior Court and the writ being dated July 20, 1890. About February 1, 1891, Wilder indorsed the notes to Elliott H. Peabody, the plaintiff in this action, who had been duly appointed administrator of the estate of Fanny G. North. Thereupon Peabody sued out his writ in this action, dated February 16, 1891, against North. No payments upon the notes or account set forth in Peabody's declaration have ever been made to Peabody, or to any one for him, by North, or by any other person for North, except as may be inferred from the facts herein referred to. The notes and accounts set forth in Peabody's declaration are the same notes and accounts set forth in Wilder's suit and declaration, and they are for the same cause of action.

Previously to the first sale Wilder desired North to purchase the premises and to take charge of Wilder's ward, agreeing to pay him for his charges and disbursements, the sum which should become due therefor to go towards the price to be paid by North for the farm; but no specific agreement was made to that end, and no talk or understanding was had after the first or second sale, except as that understanding might be inferred to continue. North entered into possession, claiming to be the owner of the farm, and took upon himself the care and maintenance of the ward, who remained in his care until her death. No accounting was ever had with Wilder, but the amount expended by North was \$1,376.68, as appears in detail in the suit

of *North v. Wilder* now pending in the Superior Court. Wilder credited himself in his account as guardian, filed in the Probate Court, with a portion of the sum due to North under the contract or arrangement.

The judge was to draw any inferences of fact from the foregoing facts which might legitimately be drawn therefrom, and if he found for the plaintiff the damages were to be assessed at \$924 as of November 1, 1892; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs to all the judges.

E. P. Pierce & J. A. Stiles, for the defendant.

W. S. B. Hopkins & F. B. Smith, for the plaintiff.

ALLEN, J. This action is brought upon two promissory notes, and also upon an account annexed. The notes were signed by the defendant, and were payable to Wilder as guardian of Fanny G. North, and after her death were indorsed by the payee to the administrator of her estate. There is also a count upon an account annexed, for the purchase price of the land sold to the defendant by Wilder as such guardian. It is stated in the agreement of facts, that after the first sale, which proved invalid, the defendant gave the notes to said Wilder in payment for the land. Properly, the notes should have been made running directly to the ward, but the fact that they ran to the guardian does not invalidate them. *Brown v. Dunham*, 11 Gray, 42. *Burgess v. Keyes*, 108 Mass. 43. *Tarbell v. Jewett*, 129 Mass. 457, 460. It is not denied by the defendant, and it is now to be assumed, that the defendant's title to the land was made good by the subsequent delivery of the deed to him. It may be inferred that both parties were bound to carry the second sale into effect, and the actual occupation of the land by the defendant, and the bringing of the present action by the plaintiff to enforce payment of the price, confirm this view.

We do not find it necessary to decide when the statute of limitations began to run, that is, when the cause of action against the defendant accrued, because upon the facts agreed the court was warranted in treating the sums due to the defendant for his services and disbursements as payment *pro tanto* on the claim for the price of the land. It was stipulated that the court might draw any inferences of fact which might legitimately

be drawn from the facts expressly set forth. The court might well find that the defendant entered into possession of the land, claiming to be the owner thereof, and took upon himself the care and maintenance of Mrs. North, under an agreement or understanding that he should be paid for his charges and disbursements, and that the sum which should become due to him therefor should go towards the price to be paid by him for the land. His care and maintenance of her continued until her death, on January 30, 1888. It is true that a guardian in contracting for his ward's support binds himself personally, and that he does not thereby directly bind his ward's person or estate. *Rollins v. Marsh*, 128 Mass. 116. *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414. But he is entitled to reimbursement out of his ward's estate for reasonable expenses incurred for the ward. In the present case there is no dispute as to the sum reasonably due to the defendant for the care and maintenance, and the administrator of Mrs. North's estate has never sought to repudiate the guardian's agreement. The case therefore stands thus. The defendant assumed the care and maintenance of Mrs. North under an agreement that he should be paid. He has entitled himself to receive therefor a certain sum, which is admitted to be justly due. He has sought to enforce payment of this sum by an action against the guardian personally. If the guardian should pay the amount, he would be entitled to reimbursement from his ward's estate. The administrator of Mrs. North's estate has recognized the reasonableness of the guardian's agreement, and has adopted and confirmed it. In the declaration upon the account annexed, he has given credit to the defendant for Mrs. North's board until her death. He now agrees that the full amount claimed by the defendant is a reasonable and proper charge to be made. Under this state of things, drawing such inferences as might properly be drawn, the court might well find that the defendant agreed to treat the sum which should reasonably become due to him for care and maintenance before he should pay for the land as a payment towards the price of the land, and it might properly give credit accordingly upon the plaintiff's claim, and thus avoid the defence of the statute of limitations.

Judgment for the plaintiff affirmed.

PATRICK GARRITY *vs.* CITY OF BOSTON.

Suffolk. March 6, 1894. — June 21, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Falling away of Grade of Street — Damages — Statute.

A petition was brought, under the Pub. Sta. c. 52, §§ 15, 16, for a jury to assess damages occasioned to the petitioner's estate by raising the grade of a street, which grade was established in 1874, by the street commissioners of the respondent city, and in that year was built to grade, and the buildings abutting upon it, including the petitioner's premises, were raised to conform to the grade, and the damages caused thereby were either released or paid for. In 1890 the whole of the district, including the street in question, fell away from the grade previously established. *Held*, that, whether the falling away was sudden or gradual, the petitioner had no remedy under the statute.

PETITION, filed April 25, 1892, for a jury to assess the damages occasioned to the petitioner's estate by raising the grade of Fellows Street in Boston. The case was submitted to the Superior Court, and, after judgment for the petitioner, to this court, on appeal, on agreed facts, in substance as follows.

By St. 1873, c. 340, the city council of the city of Boston was authorized to order the owners of lands lying within the Northampton Street district, which includes the premises described in this petition, to raise the grade of their lands to such permanent grade as might be deemed necessary by the board of aldermen to secure the complete drainage thereof. On September 1, 1873, the board of aldermen established the grade of cellars, back yards, and vacant lots, at twelve feet above mean low water; and on September 5, 1873, the city council ordered the owners to raise the grade of their estates to conform to the grade so established. Under the above statute, the city was confined to the raising of the land and buildings to such grade as would abate and prevent nuisances and preserve public health, and said land and buildings were raised to such grade, but upon the recommendation of the committee to whom was confided the carrying out of the details of the improvements contemplated by the statute of 1873, it seemed desirable that a permanent improvement of the territory should be made

by laying out certain streets, and raising them to a higher grade than the adjoining lands, so that they would correspond to the grade of the streets of the surrounding district. Upon this recommendation the street commissioners laid out certain streets, and among them Fellows Street mentioned in the petition, and fixed the grade thereof, in 1874, at eighteen feet above mean low water, and in the same year the street was built at that grade, and was thrown open to the public, and has ever since been used as a public street, and the buildings abutting on said street, including the petitioner's premises, were raised at that time to conform to that grade.

In October, 1890, the Northampton Street district, which includes Fellows Street and the petitioner's premises, had fallen away from said grade, and at this time under the direction of the superintendent of streets, the street was raised with a filling of earth and gravel, but not up to its grade as established and wrought in 1874, and by such raising the street was at its surface some three feet above the petitioner's abutting estate. The petitioner in consequence of the filling and raising done in October, 1890, was obliged to raise his buildings to conform to the condition of the street after this work was done.

If upon the above facts the petitioner was entitled to recover, judgment in the sum of seven hundred and fifty dollars was to be entered for him; otherwise, judgment was to be entered for the respondent, or the petition was to be dismissed.

R. W. Nason, for the respondent.

T. F. McDonough, for the petitioner.

LATHROP, J. The provisions of the Pub. Sts. c. 52, §§ 15, 16, under which this petition is brought, were first enacted in the Rev. Sts. c. 25, § 6, and re-enacted in the Gen. Sts. c. 44, §§ 19, 20.

As the law stood at the time of the passage of the Revised Statutes, a surveyor of ways might, in the absence of an order of the proper authorities fixing the grade of a way, raise or lower the grade at his discretion, if such action was necessary to keep the way in repair, or make it safe and convenient for travel. And such is his authority to-day. *Callender v. Marsh*, 1 Pick. 418. *Brown v. Lowell*, 8 Met. 172. *Mitchell v. Bridgewater*, 10 Cush. 411. *Burr v. Leicester*, 121 Mass. 241. See also *Sisson v. New Bedford*, 137 Mass. 255.

Before the Revised Statutes, however, a landowner who was injured by such a change of grade had no remedy. *Callender v. Marsh, ubi supra*. To meet this view of the law, which was deemed to be an injustice, the section of the Revised Statutes above referred to was enacted. *Brown v. Lowell, ubi supra*.

There have been many decisions under the section now under consideration, but none of them is decisive of the present case, or throws much light upon it; and it must be decided mainly upon general principles.

The grade of Fellows Street was established in 1874, by the street commissioners of the respondent city, and in that year was built to grade; and the buildings abutting upon it, including the petitioner's premises, were raised to conform to the grade. The petitioner concedes that the damages caused by this raising were, at that time, either released or paid for. Apart from this concession, such would be the presumption of law. *Brady v. Fall River*, 121 Mass. 262, 264.

In 1890, it was found that the whole of the Northampton Street district, which comprises many acres, and includes Fellows Street, had fallen away from the grade established sixteen years before. The agreed facts do not state whether this falling away was sudden or gradual. But we do not think it is material which it was. If an earthquake or a violent storm should cause a change of grade in a portion of a street and in a lot of land, it could hardly be contended that the restoration of the street to its established grade gave the lot owner a right to have his lot restored to grade at the expense of the city. And if the sinking is gradual, we see no reason why the city has not the right to maintain the street at its established grade, without further compensation than it has already paid.

The injury to the petitioner's land arises from the fact that he has not kept his land to the established grade.

In our opinion, the statute was not intended to apply to a case like the one now before us.

Judgment for the defendant.

MICHAEL DOYLE vs. WEST END STREET RAILWAY
COMPANY.

Suffolk. March 8, 1894.—June 21, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.*Personal Injuries caused by Electric Car — Negligence — Due Care — Regulations of Board of Aldermen — Instructions to Jury.*

The question what is an "appearance of danger" within the meaning of section 25 of chapter 6 of the Revised Regulations of 1892 of the Board of Aldermen of the city of Boston, which provides that no person having control of a street car shall, "on the appearance of danger" to carriages or persons, "fail to stop the car in the shortest time and space possible," depends upon all the attendant circumstances, and usually must be left to the jury.

In an action for personal injuries it appeared that, while the plaintiff and a man employed by him were pulling in a street on a rope attached to a tree on private land, the plaintiff was struck by an electric car of the defendant. The plaintiff objected to the judge's reference to the case of *Chisholm v. Old Colony Railroad*, 159 Mass. 3, as "instructive," and as "applicable in part," and not as conclusive. The jury were not instructed that the same rule applied to a railroad operated by steam, and to a street railway operated by electricity, but the judge remarked that "to some extent it is undoubtedly true that a motorman would have the right to assume that a person who was in the position of danger would withdraw from it, that he would hear the gong as sounded, and would take some other position," and the question was left to the jury, who were further instructed that, "if the motorman, had he been careful himself, should have seen that there was the appearance of danger, it was then his duty to stop the car as speedily as possible, and if he did not stop the car as speedily as possible, and because of the failure to stop it the plaintiff was injured, while the plaintiff was himself in the exercise of due care, the plaintiff is entitled to a verdict." The jury returned a verdict for the defendant. *Held*, that the plaintiff had no ground of exception.

TORT, for personal injuries occasioned to the plaintiff by being struck by an electric car of the defendant. At the trial in the Superior Court, before *Blodgett*, J., the following facts appeared.

The plaintiff was engaged at about 2.30 P. M. on Saturday, July 23, 1892, in taking down a tree standing upon private land abutting upon Warren Street, a public highway in Boston, sixty feet in width, having been employed for that purpose by the owner of the land. The tree stood about ten feet back

from the line of the street, and about six feet above the level of the sidewalk, with other trees on either side of it, and a house in process of construction immediately back of it. The plaintiff had cut off the top of the tree about thirty feet from the ground, had attached a long rope to the top of the remaining portion, lopped off the boughs, and made a cut with the saw nearly through the trunk about eighteen feet from the ground on the side away from the street, and then descended into the street to pull the top of the tree down. Upon the defendant's tracks on Warren Street it ran its cars by electricity, and the rail nearest the tree was twenty-three feet from the edge of the highway nearest the tree, and thirteen feet from the edge-stone of the sidewalk.

The evidence for the plaintiff tended to show that he, and one Sheehan employed by him, took hold of the end of the rope and went out into the street as far as the nearest track of the defendant; that, seeing or hearing no car approaching, they took their stand and began to pull upon the rope, the plaintiff standing directly over the rail nearest the tree with one foot inside and the other outside of the rail, and Sheehan standing just outside of it, the plaintiff with his back towards the direction of the city proper, and Sheehan facing him just off the rail on the side towards the tree; that while so engaged pulling on the rope, with their attention fixed upon the tree, and upon the protection of travellers on the sidewalk and of the house from the falling trunk, and after they had stood there long enough to give several pulls upon it, an electric car of the defendant coming from the direction of the city proper struck the plaintiff violently upon the left shoulder, breaking his collar bone, throwing him down, and severely injuring him, and the front part of the car passed over his body until the forward wheels reached him, when the car was stopped; that neither the plaintiff nor his companion saw or heard the approaching car, or had any warning of its approach until the plaintiff was struck by it; that the bell was not struck by the driver; and that the top of the tree came down just at the moment when the car struck the plaintiff.

The testimony for the defendant tended to show that the defendant's motorman saw the men pulling upon the rope at-

tached to the tree when the car was still several hundred feet away ; that the plaintiff's back was towards the car , that the men were near to but several feet outside of the track towards the sidewalk, and as the car got near to them were stepping back towards the track as they pulled ; that as the car got near the plaintiff the motorman reduced the speed from three or four miles an hour to about two miles an hour ; that just as the car reached the plaintiff the tree came down, and the plaintiff lost his balance and fell backward immediately in front of the car ; that when the car stopped a part of the plaintiff's body was upon the track and under the front platform, and the other part outside of the track, but the car stopped before the forward wheels, which were about three feet six inches back from the front of the dasher, reached him ; that the car did not knock the plaintiff down, nor strike him before he fell ; that whatever injuries he sustained were caused by his fall to the ground, or by the under side of the front part of the car striking him after he was down, or by both causes combined ; and that the gong was struck repeatedly as the car approached.

The plaintiff put in evidence the following sections of chapter 6 of the Revised Regulations of 1892 of the Board of Aldermen of the city of Boston, in force at the time of the accident, for breaches of which both the motorman and his employer are punishable by fine :

"Sect. 23. No person having the control of the speed of a street railway car shall allow it in any street to go against or afoul of any person, vehicle, or thing whatsoever ; nor shall any such person fail to stop his car at any place in a street when directed by a police officer so to do.

"Sect. 24. No person having the control of the speed of a street railway car passing in a street shall fail to keep a vigilant watch for all teams, carriages, and persons, especially children, nor shall such person fail to strike a bell several times in quick succession on approaching any team, carriage, or person, and no person shall, after such striking of a bell, delay or hinder the passage of the car.

"Sect. 25. No person having the control of the speed of a street railway car passing in a street shall, on the appearance of

danger to any team, carriage, or person from or on the appearance of any obstruction to his car, or any animal, if any there be, drawing the same, fail to stop the car in the shortest time and space possible."

The plaintiff requested the court to give the following instructions to the jury :

1. If the defendant's driver failed to stop the car in the shortest time and space possible upon the appearance of danger to the plaintiff, as required by § 25 of chapter 6 of the Regulations of the Board of Aldermen, such failure was an unlawful act of the defendant, and if such unlawful act caused the alleged injury to the plaintiff, the defendant was not in the exercise of due care, and the plaintiff would be entitled to recover if he was himself in the exercise of due care. 2. If the plaintiff and Sheehan did not either of them in fact hear the bell, and were not either of them aware of the approach of the car, and if the defendant's driver saw, or as a reasonably intelligent and prudent man ought to have seen, as he got near them, that neither the plaintiff nor Sheehan was aware of the approach of the car, and that the plaintiff was standing on the rail with his back towards the car, there was "the appearance of danger" to the plaintiff within the meaning of § 25 of the Regulations, and it was the driver's duty, if possible, to stop the car before it reached the plaintiff, provided that he was not wilfully, maliciously, or unreasonably obstructing the defendant in the use of its tracks; and if he failed to so do, and such failure caused the alleged injury to the plaintiff, the defendant was negligent, and the plaintiff would be entitled to recover if he was making a reasonable use of the highway and was in the exercise of due care. 3. If the plaintiff and Sheehan did not either of them in fact hear the bell, and were not either of them aware of the approach of the car, and if the defendant's driver saw, or as a reasonably intelligent and prudent man ought to have seen, as he got near the plaintiff, that neither he nor Sheehan was aware of the approach of the car, and that the plaintiff was standing with his back towards the car, and so near the rail and so employed temporarily that he was likely, in the natural course of the work he was doing, to come or fall suddenly in front of the car at any moment, there

was "the appearance of danger" to the plaintiff, within the meaning of § 25 of the Regulations, and it was the driver's duty if possible to stop the car before it reached the point abreast of which the plaintiff was standing, provided that he was not wilfully, maliciously, or unreasonably obstructing the defendant in the use of its tracks; and if the driver failed to do so, and such failure caused the alleged injury to the plaintiff, the defendant was negligent, and the plaintiff would be entitled to recover if he was making a reasonable use of the highway, and was in the exercise of due care.

The judge gave the first instruction prayed for, but refused to give the second and third instructions; and instead thereof gave certain instructions to which the plaintiff did not except.

The judge then instructed the jury further as follows:

"What does § 25 mean? Does it mean that, whenever the motorman discovers that there is a person upon the track, or standing in such a position in the street that, if he remains there, there will be a collision, he must stop the car? Not at all. You must find, in order to find that there was any failure to comply with this regulation, that there was the appearance of danger, and that means that there was such a condition of things that a person of ordinary prudence, intelligence, and discretion would be apprehensive of danger, and would therefore feel it to be his duty to stop the car because there was an apprehension of danger, and because the regulation required that the car should be stopped. But suppose that the person who was in fact injured by collision with the car down to the instant of the collision is standing several feet one side, and that if he remains in that position it is plain that he would not be struck by the car, is that or is it not a case where, within the meaning of this regulation, there is the appearance of danger which calls upon the motorman to stop the car in the shortest time and space possible? That question cannot be answered affirmatively or negatively by me. It is a question for you, and you would ordinarily need some other facts than the fact I have supposed to enable you to answer it intelligently.

"Suppose that the motorman saw a person standing in

the street near the rails along which the car is to go, and that such person was plainly intoxicated, but if he did not change his position he would not be hit by the car. I cannot say that a jury would not be justified in finding, in view of the condition of the man, that this regulation made it the duty of the motorman to stop the car. If a person was in that position, but apparently in a fit or in convulsions at the time, it might be the duty of the motorman to stop the car, notwithstanding it was quite clear that there would be no collision and no injury to such person if he remained in the same position.

“Where was the plaintiff when it became the duty of this motorman to stop the car to avoid a collision, if you find that it was necessary at any time to stop it to prevent a collision? Suppose the plaintiff took his stand upon the track, having one foot on one side of the rail and the other foot on the other side, and suppose he was discovered in that position by the motorman when the car was at a distance of fifty feet, or twenty-five feet, or a hundred feet, . . . and suppose the motorman then rung the gong and the speed of the car was slackened, what had the motorman a right to assume as to the probable conduct of the person who was upon the track? This regulation does not apply unless you find that there was such a condition of things that a person of ordinary prudence and intelligence would say under exactly the same circumstances that there was an appearance of danger. To some extent, it is undoubtedly true that a motorman would have the right to assume that a person who was in the position of danger would withdraw from it; that he would hear the gong as sounded, and would take some other position. And here there is a sentence or two which I may read, instructive as bearing upon this point, from the case of *Chisholm v. Old Colony Railroad*, 159 Mass. 3. It was contended that the Old Colony Railroad Company was in fault because it did not stop its train of cars, in view of the fact that the person who was injured was at the time attempting to remove a telegraph pole which had fallen down and part of which was over one of the rails, but I think not the pair of rails along which the train was moving. It did appear that the speed was slackened, and that the whistle was sounded and the bell was

rung ; but the contention of the plaintiff was, that it was the duty of the engineer, seeing the man in this position, to stop, and that an action could be maintained because of the failure to stop ; but the Supreme Court used this language, and it is language applicable in part to the case you are trying: 'Merely seeing one or more men on a railroad track at a distance, unless they appear to be helpless or disabled, does not ordinarily make it the duty of an engineer to stop a train. Especially where men are at work upon or by the side of a railroad track, it may ordinarily be expected that they will look out for the trains.'

"What had the motorman in this case the right to expect? The plaintiff says, that in view of what the plaintiff was doing, and what it was apparent to the motorman that he was doing, exerting his strength upon this rope, the motorman must have seen that there was some risk, especially when the tree broke, that the body of the plaintiff would approach nearer the track, even if he was not standing upon the track, and that for that reason it was the duty of the motorman to stop the car. That is a proper consideration. You will give it such weight as it ought to have ; but there is something to be said upon the other side. . . . Was there anything in the work of the plaintiff which made it necessary that he and Sheehan should at that particular time, and before the car passed the place where they were, pull down the top of that tree? Might they not have waited until the car passed? Was there an exigency which entitled them to say, 'The car must wait and the passengers upon the car must wait until this work is done, rather than that we should wait until the car has gone by'? Those are matters for your consideration.

"What had the motorman . . . the right to believe, as he approached the place where the plaintiff was? What had he the right to believe that the plaintiff would do in view of what he saw, in view of what he ought to have known? If the motorman, had he been careful himself, should have seen that there was the appearance of danger, it was then his duty to stop the car as speedily as possible, and if he did not stop the car as speedily as possible, and because of the failure to stop it the plaintiff was injured, while the plaintiff

was himself in the exercise of due care, the plaintiff is entitled to a verdict.

"But you need to inquire not only as to whether the plaintiff was struck by the car, but whether the plaintiff was in such a position that he would necessarily be struck by the car if he did not change his position, and was in such position for some little time before the car reached the place where the plaintiff stood, or whether the position of danger was taken by the plaintiff at the moment, or within a very short time before the actual collision. Suppose the plaintiff, pulling upon this rope when the tree broke, either fell or was thrown back, and that the fall or the throwing back of his body caused the collision. Then the question would be whether the car was stopped as soon as it could be stopped, as required by this regulation, and whether there was any violation of the regulation itself, construing it as I have told you it should be construed, because I propose to give you an instruction in the exact language in which I am asked to give it by the plaintiff with reference to this regulation, and it is as follows." The judge then repeated the plaintiff's first request for instructions.

The judge also instructed the jury as follows:

"If the defendant's driver failed to strike the bell as required by section 24 of chapter 6 of the Regulations of the Board of Aldermen, such failure was an unlawful act of the defendant; and if such unlawful act caused the alleged injury to the plaintiff, the defendant was not in the exercise of due care, and the plaintiff would be entitled to recover, if he was himself in the exercise of due care.

"If the defendant's driver allowed the car to go against or afoul of the plaintiff in violation of section 28 of chapter 6 of the Regulations of the Board of Aldermen, when he had the power to prevent it, such action was an unlawful act of the defendant; and if such unlawful act caused the alleged injury to the plaintiff, the defendant is liable, if the plaintiff was in the exercise of due care.

". . . If the plaintiff has proved that there was no carelessness on his part which contributed to the injury, and if he has proved a violation of any one of the regulations which I have read, and that such violation caused the injury which it is

acknowledged that he received at the time, the plaintiff is entitled to a verdict. But if he has not proved the things to which I have called your attention, . . . it will be your duty to return a verdict for the defendant."

At the close of the instructions, the plaintiff's counsel called the judge's attention especially to those parts in which the case of *Chisholm v. Old Colony Railroad* was cited, and quoted from as an authority, and the rules of law applicable to a steam railroad in the case of mere trespassers or licensees upon its tracks were applied to the case at bar, and in which it was said that the motorman might assume that the plaintiff would get out of the way or remain there at his peril, and might proceed accordingly without stopping his car. The plaintiff objected to the same as erroneous, and misleading to the jury. The judge declined to modify the instructions, and the plaintiff excepted.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1894, and afterwards was submitted on the briefs to all the judges, except *Holmes, J.*

H. W. Putnam, for the plaintiff.

M. F. Dickinson, Jr., for the defendant.

LATHROP, J. Under the instructions of the court, the jury must have found either that the plaintiff was not in the exercise of due care, or that the defendant was not guilty of negligence.

The second and third requests for instructions were properly refused. In effect, the presiding justice was asked to rule that certain supposed facts would of themselves amount to an "appearance of danger" within the meaning of the regulation of the board of aldermen, and that it was then the duty of the driver to stop his car, if possible, and if he failed so to do, and such failure caused the injury, the defendant was negligent. But the facts supposed did not of themselves alone amount to an "appearance of danger." What is an "appearance of danger" depends upon all the attendant circumstances, and usually must be left to the jury. In this case, the court could not rule that on all the facts there was an "appear-

ance of danger," nor that the facts supposed in the requests, taken by themselves alone, necessarily constituted an appearance of danger.

We find no error in the instructions given of which the plaintiff has the right to complain. The principal objection of the plaintiff is to the reference made by the presiding judge to the case of *Chisholm v. Old Colony Railroad*, 159 Mass. 3. The judge referred to the case as "instructive," and as "applicable in part," and not as conclusive of the question before the jury. The jury were not instructed that the same rule applied to a railroad operated by steam, and to one running in a city and operated by electricity. The remark of the judge that "to some extent it is undoubtedly true that a motorman would have the right to assume that a person who was in the position of danger would withdraw from it, that he would hear the gong as sounded, and would take some other position," we have no doubt is a correct exposition of the law. To what extent he would have the right to assume this was left to the jury. And they were further instructed that, "if the motorman, had he been careful himself, should have seen that there was the appearance of danger, it was then his duty to stop the car as speedily as possible, and if he did not stop the car as speedily as possible, and because of the failure to stop it the plaintiff was injured, while the plaintiff was himself in the exercise of due care, the plaintiff is entitled to a verdict."

Exceptions overruled.

ASAHEL W. SAWYER & another, executors, vs. JAMES
H. FREEMAN & another.

Suffolk. March 16, 1894. — June 21, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Will — Waiver by Widow — Disposition of Principal and Income of Trust.

A testator by will gave to executors a certain sum in trust to pay or expend the income so far as practicable to or for his widow, A., during life, and upon her death to pay the entire sum and all income thereof then in their hands to her daughter, B., and if not then living, to pay said sum and income to the issue of B., if she should leave issue surviving A., but if neither B. nor any issue of hers should survive A. then said sum and income should go to the residuary legatee. All the other legacies in the will were pecuniary ones; and A., the widow, having waived the provisions of the will, there remained after payment of her thirds and the allowances made by court and the expenses of administration a sum sufficient to pay but a little over sixty-eight per cent upon all the legacies. *Held*, that the income upon sixty-eight per cent of the sum given in trust was to be accumulated until the death of A., and then the entire fund, principal and income, was to be paid to B if living, and if not living then as directed in the above clause of the will. FIELD, C. J., ALLEN & KNOWLTON, JJ., dissenting as to the disposition of the income.

PETITION to the judge of probate of the county of Suffolk, by Asahel W. Sawyer and James Henry Freeman, executors of the will of James H. Freeman, late of Boston, deceased, alleging that the estate was so far settled that nothing remained to be done but to pay the legacies given, and administer the trust created by the will; that the legacies had been paid in part; that the widow, Amanda Maria Freeman, named in the will, who had waived the provisions made for her therein, had been paid in full her thirds, and the allowances made to her by the court; that the expenses of administration had also been paid in full; that the estate could pay but a little over sixty-eight per cent upon the legacies; and that the petitioners were desirous to pay the legacies as far as the estate would pay them, settle their accounts, and administer according to law the trust imposed upon them, which was in the following words, viz.: "I give to the executors of this will hereinafter named, and the survivor of them, the sum of eight thousand dollars, in trust

nevertheless to invest the same and collect the income thereof and therefrom, and pay or expend such income semiannually so far as may be practicable to or for Amanda Maria Freeman, formerly Amanda Maria Farrington, of Franklin, in the county of Norfolk and said State of Massachusetts, so long as she shall live, and upon the death of said Amanda Maria Freeman to pay the whole of said sum of eight thousand dollars and all income thereof then in their hands to Julia Ann B. Lewis, her daughter, named in the following clause of this will, and in case said Julia Ann B. Lewis shall not be living at the death of her mother, then to pay said sum and income, share and share alike, to the issue of said Julia Ann B. Lewis if she leave issue who survive said Amanda Maria Freeman; but if neither said Julia Ann B. Lewis nor any issue of hers shall survive said Amanda Maria Freeman, then said sum of eight thousand dollars and income shall be held to be part of the rest, residue, and remainder of my property, and go and be paid to my nephew James Henry Freeman, hereinafter named."

Julia Ann B. Lewis contended that the same proportion of the eight thousand dollars so given in trust as was paid upon the other legacies given by the will should be at once paid over to her, or, if not, that said proportion be invested and the income therefrom be paid to her until the death of Amanda Maria Freeman named in the will, when said proportion should be disposed of as directed by the will. James Henry Freeman, one of the executors, contended that the same proportion of the eight thousand dollars so given in trust should be invested and the income therefrom paid to him as residuary legatee as undivided property until the death of Amanda Maria Freeman, when said proportion should be paid over as directed by the will. All the legatees named in the will except Julia Ann B. Lewis and James Henry Freeman, contended that the same proportion of the eight thousand dollars so given in trust, should be invested, and the income therefrom paid to all the legatees except the widow, Amanda Maria Freeman, proportionally to their several legacies, until the legacies were paid in full, or until the death of Amanda Maria Freeman, when the whole of said proportion should be paid over as directed by the will. The will contained seven pecuniary legacies, five of which were to a

nephew and nieces and the daughter of a niece, and James Henry Freeman, one of the executors, was named residuary legatee.

The judge decreed that the executors should pay over to "Julia Ann B. Lewis the same proportion of said eight thousand dollars (\$8,000), given in said trust as aforesaid, as is paid upon the other legacies given by said will, together with whatever income may have accrued thereon in their hands, in full discharge of said trust, and said trust shall thereupon be discharged"; and James H. Freeman appealed to this court.

The parties in interest filed the following agreement:

"It is hereby stipulated and agreed that Amanda Maria Freeman, widow of the testator, waived the provisions made for her in the will, and has been paid her allowances made by the judge of probate of \$2,200, and her one third of the estate, which was all personal property, \$6,342.64, both amounting to \$8,542.64; that the net cash of the estate of the testator to pay all the legacies of the will, including the trust fund, the disposition of the income of which during the life of the widow is in question, was \$21,228.03; that the total amount of the legacies, including said trust fund, was \$18,500; that, deducting the \$8,542.64, the amount of the widow's allowances and her one third of the estate, from net cash of the estate, \$21,228.03, there is left but \$12,685.39 with which to pay all the legacies, amounting to \$18,500; that this sum of \$12,685.39 pays only a little more than sixty-eight and one half (exactly 68.569189189) per cent of all the legacies, amounting to \$18,500, leaving nothing for the residuary legatee; that the estate is fully settled, and all the legatees paid the proportional part of their legacies which the estate is able to pay, except that the executors named as trustees are to properly dispose of the trust fund and the income thereof, which fund is now sixty-eight and one half and a fraction per cent of \$8,000, or \$5,485.57; that had the widow accepted the terms of the will there would have been the sum of \$21,228.03 with which to pay all the legacies, amounting to \$18,500, thus leaving to the residuary legatee the sum of \$2,728.03."

Julia Ann B. Lewis, the appellee, was at the death of the testator his only child, and of course his sole next of kin, and only heir at law. She has a son living about fourteen years of age.

On motion of the executors, Ray F. Lewis, a minor and only child of Julia Ann B. Lewis, was admitted as a party, and Samuel Williston, Esq. was appointed his guardian *ad litem*, and to represent the interests of persons not in being.

Hearing before *Knowlton, J.*, who was of opinion that the decree of the Probate Court should be set aside, and sixty-eight and one half per cent of \$8,000, viz. \$5,485.57, be held by the executors until the death of Amanda Maria Freeman, and then paid over to Julia Ann B. Lewis if she were then living, and if she were not then living to her issue, if she should leave issue surviving Amanda Maria Freeman; but if neither she nor any of her issue should survive Amanda Maria, then to James Henry Freeman; that the income of this fund should be divided among the legatees whose legacies were diminished by the widow's waiver in proportion to the amounts which they had respectively contributed to the share of the widow, and that the portion applicable to this legacy of \$8,000 should be paid over to the same persons to whom the principal was paid; and if the whole amount contributed by the legatees should be made up by this distribution of income, the income accruing after that time should be paid to James H. Freeman, the residuary legatee.

At the request of the parties, the justice reserved the case for the consideration of the full court.

The case was argued at the bar in March, 1894, and afterwards was submitted on the briefs to all the judges.

H. G. Parker, for James H. Freeman.

S. Williston, guardian *ad litem*, for Ray F. Lewis, and possible contingent interests.

G. W. Wiggin, for Julia Ann B. Lewis.

HOLMES, J. If the income during the life of the widow is not disposed of otherwise, it is part of the residuary fund, and as such is applicable to the payment of the pecuniary legacies. The residuary legatee has no claim until those legacies are satisfied. *Blaney v. Blaney*, 1 Cush. 107, 117. *Firth v. Denny*, 2 Allen, 468, 471.

Whatever is given to the daughter, Julia Ann B. Lewis, income as well as principal, is given her "in case said Julia Ann B. Lewis shall not be living at the death of her mother." Until

that time, although her interest is vested, nothing is given to her unconditionally. Income and principal stand on the same footing. Under our decisions at least, we cannot read "at the death of her mother" as meaning whenever, either at or before the death of her mother, the interest of the latter shall come to an end. *Brandenburg v. Thorndike*, 139 Mass. 102. Therefore the daughter is not now entitled absolutely to the income by acceleration, assuming that we should apply that doctrine in the case of a gift for life with a remainder over not subject to be divested. *Vance's estate*, 141 Penn. St. 201, 210. *Yeaton v. Roberts*, 28 N. H. 459. *Holderby v. Walker*, 3 Jones Eq. 46. *Macknet v. Macknet*, 9 C. E. Green, 277. See *Upham v. Emerson*, 119 Mass. 509, 513. If then the income during the widow's life is not given in express terms with the fund from which it comes, it is to be applied to the pecuniary legacies.

The question whether it is so given is a doubtful one. If it is, the words which do it are "and all income thereof then in their hands." It is possible, if not likely, that the testator when he used those words was thinking only of such income as the trustees did not happen to have laid out at the widow's death in the ordinary course of expenditure under the trust, and that he was not thinking of the overthrow of his scheme for the whole previous time by his widow's waiving the provisions of the will. But it has been said that a testator must be taken to have contemplated the possibility of a waiver. *Upham v. Emerson*, 119 Mass. 509, 513. And if that ever is to be assumed, there are unusual reasons for making the assumption in this case. The way in which he mentions his wife suggests that he is dealing with her somewhat at arm's length. He does not call her his wife, but "Amanda Maria Freeman, formerly Amanda Maria Farrington, of Franklin, in the county of Norfolk"; a noticeable contrast to his way of speaking of his nephews and nieces, whom in the legacies given to them he calls nephews and nieces. He gives her nothing outright, but only an equitable life interest in eight thousand dollars, less than half of an estate of less than twenty thousand dollars. The nature of the gift is such that the widow almost was invited to consider whether she would not waive it, and the manner of it suggests

that the testator may have had the chance of her doing so in his mind.

Taking the language of the will literally, the income goes with the principal: "upon the death of said Amanda Maria Freeman to pay the whole of said sum of eight thousand dollars and all income thereof then in their hands to Julia Ann B. Lewis, her daughter." The same language is repeated in substance, showing that income as well as principal was steadily before the testator's mind: "in case said Julia Ann B. Lewis shall not be living, . . . then to pay said sum and income," and again in the last event "said sum of eight thousand dollars and income shall be held to be part of the rest, residue, and remainder." There does not seem to be any sufficient reason for limiting the income disposed of to income in the hands of the trustees for one cause only. It seems to be safe to give the language its literal force, and to read it as meaning all income of the fund which has accrued since the testator's death, and which for any reason remains unexpended or not paid over to the widow. It is not very useful to conjecture what the testator had in his mind. It often happens that a residuary clause passes property which the testator intended and directed to go a different way. *Batchelder, petitioner*, 147 Mass. 465, 468. The words "all income thereof then in their hands" are a sort of special residuary clause for that fund, and there seem to be similar reasons for treating them as a drag-net within the sphere of their operation. *Brandenburg v. Thorndike*, 139 Mass. 102, 104.

The income is to be accumulated until the death of the widow, and then the entire fund, principal and income, is to be paid to the daughter if she is living at that time. If she is not then living, then as directed in the clause of the will which we have construed.

Decree accordingly.

The Chief Justice and Justices Allen and Knowlton dissent from this opinion. Their view of the case is as follows. The widow by her waiver took certain property from other legatees and gave up her own legacy. Except as the waiver necessarily modifies it, the will is to be given effect as nearly as possible according to its terms to carry out the intention of the testator.

He gave his widow the income of \$8,000 for her life. What he gave in the same clause to his daughter or to her issue, or, if they should not survive his widow, to his residuary legatee, was only the principal sum of \$8,000, and any income which might accrue after the payments regularly made to his widow before her death. The payments were to be made so far as practicable semiannually, and the entire accrued income belonged to her as the time for each payment arrived. There would probably be in the executor's hands at the time of her death a small amount of income which accrued after the last payment. This with the principal was given over. The income which accrued previously was the widow's legacy, and if the will was given full effect, no part of it would go to any one else. If the testator thought of the possibility of its being waived by the widow, he must be presumed to have expected that it would be used as the law uses such legacies in cases of waiver by a widow, to make up so far as possible the legacies which are diminished to furnish her with her distributive share of the estate.

The fact that the renounced legacy is in the form of income furnishes no reason why it should not be used to reimburse the pecuniary legatees proportionally so far as possible for the sums contributed by them to the share of the widow. The words "income thereof then in their hands" cannot have one meaning if the will is allowed to operate as the testator intended it should, and a different meaning if some of its provisions are set aside by the widow.

COMMONWEALTH vs. SUFFOLK TRUST COMPANY.

Suffolk. March 23, 1894. — June 21, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Appeal from Decree of Single Justice — Record — Deposit in Trust Company —
Assignment — Ultra Vires.*

An appeal from the decree of a single justice brings up merely the record of the case, and parties cannot, at least without the sanction of the single justice, add to or diminish the record; and the question before the court, on such an appeal, is whether the decree is justified by the record.

Without considering the question whether generally an endowment order has or has not the power to borrow money, or whether an action can be maintained against it upon its promissory note, it has the power to deposit its money in a trust company and to draw it out when needed, and, on the failure of the trust company, a claim against it accrues in favor of the order, which claim the order can assign by way of pledge.

The by-laws of an endowment order provided that the officers should be a president, clerk, treasurer, secretary, superintendent, and three trustees; that they should constitute a supreme executive board, with the power of directors; that they should have in general "all the powers of the corporation except as limited by the vote of the stockholders"; and that four should constitute a quorum. On July 25, 1891, E., the supreme treasurer and secretary, and G., the supreme president, having bought the shares of stock of the other incorporators, the other officers resigned except one, who with the two first named continued in office. Notices of these changes were sent to the certificate holders, and no question was made as to the validity of the transaction, or as to the authority of the treasurer and president to conduct the affairs of the order. At the time when E. and G. were elected president and secretary, they held the offices of superintendent and trustee, which offices they did not resign. There was nothing in the by-laws to show that a person could not hold two offices, and when the officers were first elected the same person was chosen both clerk and trustee. The order had a deposit in the A. Trust Company in the names of G., president, and E., treasurer, who, not being able to draw it as the company was in the hands of a receiver, borrowed, on September 25, 1891, a sum of money from the B. Trust Company and gave an assignment in writing of the claim of the order against the A. Trust Company as security therefor. The assignment purported to be the instrument of the order, to be executed by it "by E., Supreme Treasurer," and to be assented to "by G., Supreme President." Held, that, without considering whether E. and G. could legally act as directors under the by-laws, so as to hold a directors' meeting, it was clear that an invalid vote of the directors could be ratified by the order, and as E. and G. were then the only stockholders and passed the vote, and had ever since acquiesced in it, and the order had received the benefit of the money, the receiver of the order could not ask a court of equity to forbid the payment of the debt out of the fund in the hands of the receiver of the A. Trust Company.

LATHROP, J. This is an appeal by the receiver of the Mutual Life Endowment Order from a decree of a single justice of this court, directing the receiver of the Suffolk Trust Company to pay to the International Trust Company the sum of two thousand dollars, with interest at the rate of seven per cent per annum, from March 30, 1892.

Before the case was heard by the single justice, it was sent to a master, who heard the parties and made a report, which, with certain exhibits annexed thereto, appears in the papers before us.

After the appeal was taken, the counsel for the respective parties, without the sanction of the justice who heard the case, made an agreement as to certain evidence which the agreement states was put in before the single justice, and as to the contents of certain exhibits annexed to the master's report, which are not set forth in those exhibits as annexed. This proceeding was wholly irregular. An appeal from the decree of a single justice brings up merely the record of the case, and parties cannot, at least without the sanction of the single justice, add to or diminish the record. The question before us, on such an appeal, is whether the decree is justified by the record. From the record in this case the following facts appear.

The Mutual Life Endowment Order, a corporation established under the laws of New Hampshire, in 1891 had a deposit of ten thousand dollars in the Suffolk Trust Company, standing in the names of George F. Morse, president, and Edwin J. Morse, treasurer. On September 25, 1891, these persons, not being able to draw out the ten thousand dollars, or any part of it, on account of the failure of the Suffolk Trust Company, which was then in the hands of a receiver, and desiring to obtain two thousand dollars for the purposes of the corporation of which they were officers, borrowed two thousand dollars from the International Trust Company, and gave an assignment in writing of the claim of the Mutual Life Endowment Order against the Suffolk Trust Company as security therefor. The assignment purported to be the instrument of the Order, to be executed by it "by Edwin J. Morse, Supreme Treasurer," and to be assented to "by George F. Morse, Supreme President." The assignment recited that it was "made to secure the payment of the promissory note of the said Mutual Life Endowment Order

to the said International Trust Company of even date herewith for the sum of two thousand dollars." At the same time a promissory note of the Order for two thousand dollars, with interest at the rate of seven per cent per annum, was delivered to the International Trust Company.

The money so received was paid out to certificate holders in the usual course of business, just as if it had been drawn from the Suffolk Trust Company, and in accordance with the rules of the Order. No question was made by any of the members of the Order as to the validity of this transaction, or by any one else except by the receiver of that Order.

The receiver concedes that the Mutual Life Endowment Order had, under the laws of the State of New Hampshire, the power to make contracts necessary and proper for the transaction of its authorized business; but he contends that, as it was a fraternal benevolent association, it had no power to borrow money; and that the transaction in question was *ultra vires*.

We have no occasion to consider the question whether generally such a corporation has or has not the power to borrow money, or whether an action could be maintained against it upon its promissory note. It had undoubtedly the power to deposit its money in the Suffolk Trust Company, and to draw it out from time to time, as needed in the course of its business. On the failure of the Suffolk Trust Company, a claim against it accrued in favor of the Mutual Life Endowment Order. This claim it could collect, or, if the exigencies of its business required, it could sell outright. And we have no doubt that it could assign the claim by way of pledge. It was certainly reasonable that it should do so, under the power to make contracts necessary and proper for the transaction of its authorized business; and we have no doubt that the transaction in this case, which, in effect, was merely a device to draw money which could not be got directly, was valid.

While the assignment was in terms to secure the note, the effect of it was to secure the debt. Equity in such a case disregards the form, and looks at the real nature of the transaction. In *Scott v. Colburn*, 26 Beav. 276, the directors of a company were prohibited from giving bills of exchange, but had the power to borrow on mortgage. They however gave bills of

exchange to secure an existing debt, and a mortgage was at the same time executed under the seal of the company, conditioned on the payment of the bills. It was held that the mortgage was to be regarded as given to secure the debt, and not the payment of the bills, and therefore was not invalid.

It is further contended by the receiver, that George F. Morse and Edwin J. Morse had no authority to execute the assignment. The by-laws of the Order provided that the officers should be a president, clerk, treasurer, secretary, superintendent, and three trustees; that these officers should constitute a supreme executive board, with the power of directors; that they should have in general "all the powers of the corporation, except as limited by the vote of the stockholders"; and that four should constitute a quorum of the board. On July 25, 1891, the two Morses bought the shares of stock of the other incorporators. All of the other officers resigned except one, the clerk, named Warren, and he and the two Morses continued to act as the officers of the Order, George F. Morse having been elected president, and Edwin J. Morse secretary and treasurer. Notices of these changes were sent to the certificate holders, and it did not appear that any question was made in regard to the validity of the transaction, or as to the authority of the Morses to act or to conduct the affairs of the Order. At the time the Morses were elected president and secretary, they held the offices of superintendent and trustee, and it does not appear that they resigned these offices. There is nothing in the by-laws to show that a person could not hold two offices, and when the officers were first elected Warren was chosen both clerk and trustee. Without, however, considering whether they could legally act as directors under the by-laws, so as to hold a directors' meeting, it is clear that an invalid vote of the directors could be ratified by the Order, and as the Morses were then the only stockholders, and passed the vote, and have ever since acquiesced in it, and the Order has received the benefit of the money, we see no ground upon which the receiver can ask a court of equity to forbid the payment of the debt out of the fund in the hands of the receiver of the Suffolk Trust Company. *Decree affirmed.*

J. R. Smith, receiver, pro se.

G. P. Wardner, for the International Trust Company.

WILLIAM FENTON vs. WILLIAM A. GRAHAM.

Middlesex. June 18, 1894. — June 21, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Insolvency — Composition Proceedings — Discharge — Assent of Creditors — Statute.

In determining under St. 1884, c. 286, as amended by St. 1885, c. 353, § 2, the number and value of the creditors of an insolvent debtor who have proved their claims in proceedings for composition, all are to be counted who have proved their claims up to the point of time when the judge proceeds to decide the question whether the assent filed is sufficient, and the other questions involved in determining whether the composition should be confirmed.

BILL IN EQUITY, filed June 11, 1894, by a creditor of an insolvent debtor to revise certain proceedings in the Court of Insolvency.

The bill alleged that, on or about April 20, 1894, the defendant filed in the Insolvency Court of Middlesex County a voluntary petition in insolvency, and at the same time an offer of composition of thirty per cent, under the provisions of the Composition Acts, so called; that a hearing was had upon the offer on or about May 10, and certain claims were proved at the hearing; that at an adjourned hearing held on or about May 24, the plaintiff, who was a creditor of the defendant, and many other creditors, duly proved their claims; that three fourths in number and value of all the creditors who duly proved their claims did not make written assent to the offer of composition at or before the adjourned hearing, not counting in the number of creditors those creditors whose claims were less than fifty dollars in amount; and that nevertheless the Court of Insolvency ruled that a sufficient assent to the proposal had been filed, and decreed and ordered that an adjourned hearing should be held on Monday, June 11, to proceed to determine whether the composition should be confirmed.

The prayer was for an order directing the Court of Insolvency to continue and adjourn the proceedings until the further order of the court, and that the rulings be reversed, and the Court of Insolvency be directed to decree that the proposal of composi-

tion should not be confirmed, and that the case proceed in insolvency.

Hearing before *Barker, J.*, who issued an order continuing the case without confirming the composition offered until further order of the court, and ruled that all claims of creditors proved and allowed in the insolvency cause up to the time of the actual hearing on the confirmation of the composition, were under the provisions of St. 1885, c. 353, § 2, and of Rule XVII. of the Rules of the Courts of Insolvency, to be reckoned in determining the question whether the assent of creditors necessary to make it competent for the judge of insolvency to confirm a composition had been filed, and ordered that the restraining order should be continued in force. The justice reported the question for the determination of the full court.

J. Prentiss, for the plaintiff.

P. H. Cooney, (*J. J. Shaughnessy* with him,) for the defendant.

KNOWLTON, J. The only question in this case is whether, under St. 1884, c. 236, as amended by St. 1885, c. 353, § 2, in determining the number and value of the creditors of an insolvent debtor who have proved their claims in proceedings for a composition, those only who proved on the first day of the hearing shall be counted, or those also who proved afterward on the day to which the hearing was adjourned. The section referred to is in part as follows: "The hearing shall then be adjourned not less than seven days, and notice thereof sent to all creditors as before provided; and if at or before the day to which such or any subsequent adjournment is made the debtor shall file in court the written assent to the proposal of the majority in number and value of the creditors who have proved their claims . . . the court shall proceed at the hearing, or at a further adjournment thereof, to determine whether the composition shall be confirmed, and any creditor may be heard thereon," etc.

The proposal for composition may be filed at any time after the filing of the petition by or against the debtor, and often it is filed, as it was in this case, on the same day as the petition. Only seven days' notice of the hearing on the proposal is required by the statute, and if the debtor's view of the law were correct only such creditors as proved their claims on the first

day could be considered in determining whether he had obtained the assent of a sufficient number. In many cases the receipt of the notice of the proposal gives the creditor his first information of the debtor's insolvency, and it would be a hard rule that would deprive him of his right to be considered upon the question of composition if he failed to prove his claim at the first meeting. The debtor would be likely to be active in inducing his friends to prove their claims, and it would often happen that those appearing at the first meeting would not fairly represent the whole body of creditors.

Under the original statute before the amendment above quoted the debtor in order to make a composition was obliged to procure the assent of the prescribed proportion of all his creditors, and only those who had proved their claims could be counted in favor of the composition. This provision was thought to put too great a burden on the debtor, and the law was amended so that the proportion required should be of those creditors who proved their claims, instead of the whole number. The debtor may file the assent "at or before the day to which such or any subsequent adjournment is made." He may from time to time file the assent of additional creditors, up to the very moment when the court is about to determine whether he has the assent of a sufficient number. Under § 26 of Pub. Sts. c. 157, which is made applicable to the Composition Act, creditors may prove their claims at any meeting. The condition in regard to assent of creditors to which the statute refers is the condition at the time of the hearing. Until then the rights of the parties are not fixed. Additional claims may be proved, and the debtor may file the assent of additional creditors. If he chooses to file the assent of some of them before the day of the final hearing, he gets the benefit of an agreement from each, which is irrevocable unless the court upon hearing gives the creditor leave to withdraw it. *Beverly Bank v. Wilkinson*, 2 Gray, 519, 520. *In re Borst*, 11 Nat. Bankr. Reg. 96. If the debtor is embarrassed by the proof of an unexpected number of new claims at the adjourned meeting, it is in the power of the court to give him time to try to procure the assent of those who prove them. In this way there is no difficulty in protecting the rights of all parties.

This interpretation of the statute is in accordance with the

practice and the decisions under other similar statutes. Under Pub. Sts. c. 157, § 86, a certificate of discharge cannot be granted "unless the assent in writing of . . . creditors who have proved their claims is filed in the case within six months." That is, the assent may be filed "at or before" the expiration of six months. But if the filing is before the expiration of the time the "creditors who have proved their claims" within the meaning of the law are not merely those who have proved at the time of the filing, but those who have proved at the end of the six months when the rights of the parties become fixed. *Gates v. Campbell*, 8 Cush. 104, 108. *Journey v. Gardner*, 11 Cush. 355, 356.

The provisions of the bankruptcy act in relation to the discharge are in similar language, and have received the same construction. U. S. Rev. Sts. §§ 5108, 5112, 5116. *In re Borst*, 11 Nat. Bankr. Reg. 96.

Insolvency Rule XVII. could not change the statute, and was not intended to change it, or to put upon it any other construction than the one above stated. It is as follows: "In composition cases claims may be proved at any meeting; but creditors who have not proved their claims prior to the hearing on confirmation of the composition shall not be counted in ascertaining the sufficiency of assent to such composition." The words "hearing on confirmation of the composition" refer to the point of time when the court takes into consideration the question of the sufficiency of the assent, and the other questions involved in deciding whether the composition should be confirmed. They do not refer to the general hearing on the proposal, of which notice is to be given when the proposal is filed, and which is begun on the first day before the adjournment required by the statute. They specify a particular hearing in distinction from the general hearing. The particular hearing referred to may not begin until after claims have been proved and other business has been done on the day to which the adjournment was made, or on any subsequent day to which there is an adjournment.

We are of opinion that the Court of Insolvency should be directed to enter a decree that the proposal of composition shall not be confirmed unless before the final hearing the debtor files

the assent of additional creditors enough to make three fourths in number and value of the creditors who at the final hearing shall have proved their claims. *Decree accordingly.*

ALBERT E. HECTOR vs. BOSTON ELECTRIC LIGHT COMPANY.

Suffolk. November 14, 15, 1893. — June 22, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Amendment of Exceptions — Personal Injuries from Contact with Wire charged with Electricity — Licensee — Statute.

The presiding judge is not required by law to allow amendments of the bill of exceptions by the excepting party, but his power so to do is undoubted, and although such amendments cannot be allowed without the consent of the excepting party, they may be allowed with his consent so far as is necessary to make them conformable to the truth and the whole truth with reference to the questions of law raised at the trial, and included in the original bill of exceptions.

It is within the power and discretion of the presiding judge to allow amendments to a bill of exceptions which are made after the time for filing the original bill has expired.

A lineman employed by a telephone company having, for the purpose of affixing wires of the company to a standard erected on the roof of a building by an electric lighting company, an implied license to reach the roof by going up through the building, who uses a different way, and, while unnecessarily upon the roof of an adjoining building, sustains injuries from contact with an un-insulated wire charged with electricity belonging to the electric lighting company, is not acting within the scope of his license, and is not entitled to recover.

The St. 1888, c. 221, extending the laws as to the erection and laying of telegraph and telephone lines, except Pub. Sta. c. 109, §§ 16, 18, to lines for the transmission of electricity for the purpose of lighting, relates solely to the authority to erect, lay, and maintain such lines, and to the regulation of such lines, and it does not relate to the liability of electric light companies for injuries received by any person from the posts, wires, or other apparatus of such companies.

TORT, for personal injuries occasioned to the plaintiff from contact with a wire through which an alternating electric current was being transmitted.

The first count of the declaration alleged that the defendant was a corporation engaged in the business of furnishing artificial light and power by means of electricity, and that for the pur-

pose of transmission and distribution of the same it maintained lines of wire attached for their support to standards, posts, or poles erected upon buildings, that on March 10, 1890, such a wire was strung by the defendant over a building numbered 41 on Temple Place in the city of Boston, through which alternating electrical currents were being transmitted; that the currents were of such force as to be dangerous to human life and health if the wire should come in contact with the human body; and that the defendant negligently permitted the wire to be suspended in such a position and at such a distance from the roof that the plaintiff, while in the discharge of his duty as a lineman of the New England Telegraph and Telephone Company upon the roof of the building No. 41 Temple Place, and while in the exercise of due care, was injured by contact with it.

The second and third counts were similar to the first, except that they alleged the accident to have occurred by reason of the defective insulation of the wire at the point where the plaintiff came in contact with it; and by the third count the plaintiff claimed damages for his injuries under the provisions of Pub. Sts. c. 109, § 12, and St. 1883, c. 221. Answer, a general denial.

The defendant also demurred to the declaration, assigning as grounds therefor, in substance, that the declaration did not contain averments of fact sufficient to create a duty on the part of the defendant towards the plaintiff, or to impose upon it any statutory liability.

The Superior Court overruled the demurrer; and the defendant appealed to this court.

The case was then tried in the Superior Court, before *Dewey, J.*, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions, the nature of which appears in the opinion.

E. W. Burdett & C. A. Snow, for the defendant.

S. L. Whipple & W. M. Noble, for the plaintiff.

FIELD, C. J. The exceptions in this case as amended were allowed by the presiding justice of the Superior Court, if it was within his authority and discretion to allow them, otherwise they were disallowed. The original draft of the exceptions was filed on February 20, 1892, within the time allowed. In

April following the counsel of both parties were heard upon the allowance of the exceptions. The plaintiff's counsel then asked that they be disallowed, which the justice at that time declined to do, but he suggested that the counsel confer together, and that the plaintiff's counsel point out what changes they thought should be made. This was done, and the draft of the exceptions was altered, and some things added to it with the consent of the counsel of the defendant, who, however, did not admit that all such alterations and additions were necessary. The plaintiff's counsel did not waive their objections to the allowance of the amended draft, but contended that it was substantially a new bill of exceptions, made up and filed after the time prescribed by the statute for filing exceptions had passed. Copies of the exceptions have been furnished us, showing the difference between the bill as originally filed and the bill as amended.

The excepting party has a right, if he chooses, to stand upon his exceptions as originally filed, and to prove the truth of them if they are not allowed. The extent to which errors in such exceptions can be corrected on a petition to prove the exceptions was considered in *Morse v. Woodworth*, 155 Mass. 233. The extent to which the presiding justice can allow the excepting party to amend his bill of exceptions has not been determined. In such a case as this, where many questions of law were raised at the trial, one of which was that upon all the evidence the plaintiff could not recover, it is hardly possible that the original draft of the exceptions, without any change, would be entirely acceptable to either the presiding justice or to the other party. The other party under the statute has a right to be heard upon the allowance of the exceptions, and the practice has been to permit the excepting party, if he chooses, with the consent of the presiding justice, to amend his exceptions so as to state more accurately and completely the questions of law which were raised at the trial and included in the bill of exceptions as filed. It is true that the presiding justice is not required by law to allow any such amendments, but his power to allow amendments is undoubted. *Perry v. Breed*, 117 Mass. 155. They cannot be allowed without the consent of the excepting party, but with his consent they can be, certainly so far as is necessary

to make the exceptions conformable to the truth and the whole truth with reference to the questions of law raised at the trial and included in the original bill of exceptions.

We have no occasion to consider in this case whether a distinct exception taken at the trial and omitted from the bill as filed by accident or mistake can be added by an amendment to the original draft after the time has expired for filing exceptions. In the present bill we think that the amendments allowed by the presiding justice, with the consent of the defendant, were such as were within his power and discretion to allow.

The plaintiff was a lineman of the New England Telegraph and Telephone Company, and went upon the roof of the building No. 41 Temple Place, Boston, called the Youth's Companion building, for the purpose of affixing a telephone wire to a standard erected upon the roof of the building No. 45 Temple Place, which adjoined No. 41 on the side toward Washington Street. It was intended that this wire should run from West Street to this standard, and thence should swerve slightly toward Washington Street and pass across Temple Place. He was injured while on the roof of No. 41 by his left hand coming in contact with a wire belonging to the defendant, through which an alternating electric light current was being transmitted. This electric light wire ran over the southeasterly corner of the building on which he was, and at the point where the plaintiff's hand came in contact with it was about twenty-five feet from the corner. The wire formed one side of an alternating electric light circuit, the other wire of the circuit running parallel with it and at a distance of seventeen and a half inches from it. No wires of any kind were attached to the roof of No. 41 Temple Place, and the roof was clean, smooth, and unobstructed by anything except a scuttle near the back part of it, a skylight near where the plaintiff fell, and two or three other skylights near the rear of the roof. The roof of the building No. 45 Temple Place was about twenty feet below the roof of the building No. 41, and each was a flat, or nearly flat roof. Near the centre of the roof of No. 45, the defendant, which is a corporation engaged in the business of furnishing electric light and power in the city of Boston, had erected a standard about twenty-five feet

in height, on which were three cross arms running horizontally and at right angles with the line of Temple Place. This standard was used for the purpose of supporting various wires which were attached to it, and ran from it to two other fixtures on the other side of Temple Place. The highest cross arm was about five feet long, and had on it four glass insulators placed seventeen inches and one half apart, attached to which were four arc electric light wires. The next lower cross arm was placed two feet below this, was about eight feet in length, and had upon it six insulators, placed at the same distance apart, to which were attached electric light wires. The two insulators next to the upright post, one on each side, had attached to them the two alternating electric light wires, and the remainder of the insulators had attached to them four arc electric light wires. The lowest cross arm was placed about one foot and one half below the middle cross arm, was about twelve feet in length, and had on it ten insulators placed twelve inches apart, to which were attached ten wires not electric light wires, of which at least six were telephone wires. All the wires attached to this standard ran northeasterly across Temple Place, above the southeast corner of the roof of No. 41, to two fixtures on the other side of Temple Place on the buildings No. 24 and 34. All the arc electric light wires ran to a standard on No. 24, and the two alternating electric wires on the middle cross arm, and the telephone and other wires on the lowest cross arm, ran to a standard on No. 34. The wires thus starting from the same standard on No. 45, as they crossed over the corner of the roof of No. 41, diverged and formed two distinct groups of wires, which for convenience are called the first and second groups, the wires running to No. 24 constituting the first group, and those running to No. 34 the second group. The point at which the second group of wires crossed the side of the roof of No. 41 next to No. 45 was distant from the southeast corner of the roof of No. 45 about fifteen feet, and the point where the first group crossed this side was distant from the same corner about twenty feet, so that there was a distance of about five feet between the two groups on the side of the roof of No. 41 next to No. 45. Between the place where these groups of wires crossed the side of the roof of No. 41 next to No. 45 and the rear of the roof of

No. 41 there was a distance of about seventy feet, and there was no obstruction of any kind on this part of the roof except two chimneys, each four feet in width, nor was there any wire, and any one might have gone on any portion of that part of the roof and looked down upon the roof of No. 45 without encountering any danger. The first group of wires, as they crossed above the corner of the roof of No. 41 were at distances varying from four to six feet above the roof; the two alternating electric light wires, which were in the second group, were at a distance of about two feet and a half above the roof, and the telephone and other wires running from the lowest arm of the fixture on No. 45 were about one foot below the alternating electric light wires.

The plaintiff, at the time of the accident, was at work with others for the Telegraph and Telephone Company in stringing a telephone wire from the top of a building in West Street to the standard on No. 45 Temple Place, and thence to a fixture on the top of a building on the other side of Temple Place. He was told by the foreman to go upon the building No. 45 Temple Place and attach this wire to the standard there. He went up through the building No. 29 Temple Place, called the Warren building, and out upon the roof of that building, thence across the intervening roofs to the roof of No. 41. There were no steps or other means provided for getting from the roof of No. 41 to the roof of No. 45, and there was no ladder or rope on the roof which could be used for this purpose. There was access to the roof of No. 41 through the building No. 41, and also access to the roof of No. 45 through the building No. 45. The plaintiff, after getting upon the roof of No. 41, and after calling to a fellow workman in the street to come up on the roof of No. 45, went to look over the side of the roof of No. 41 to see how he could get down upon the roof of No. 45. He was looking over the side of the roof on to the roof of No. 45, and was stooping down — he had to stoop down to clear a large bunch of the wires — when he felt a current of electricity go through him, and he remembered nothing more. The plaintiff was found lying under the first group of wires, with four of his fingers burnt and a wound upon the side of his head where the hair was burnt off. The nearer of the two alternating electric light wires, as one approached them in going toward the side of the roof, had upon it

some pieces of burnt flesh, which showed where the plaintiff had touched the wire, and the insulation of the wire where it appeared that the plaintiff had touched it was worn off. The plaintiff had had a long experience with electrical apparatus, — was familiar with all kinds of electrical wires and the proper methods of handling them, and the dangers attendant upon the business. He testified “that he knew the general character of the structures used by the various companies in the prosecution of their business in Boston; that the Boston Electric Light Company has a structure of a peculiar color of its own, and that the fact last referred to was common knowledge among all linemen; that the Telephone Company had structures of a different color from that of the Boston Electric Light Company; that the colors of the structures used by the other companies in Boston also differed from the color of the structures of the Boston Electric Light Company; that linemen, if they were close enough to see the color of a structure, could easily tell whether it belonged to one company or another; that in the prosecution of his work as a lineman he had occasion in Boston to go on to roofs which were crossed by all sorts of wires, and to go upon structures which had all sorts of wires; that on the structure on 45 Temple Place he would not have been surprised to find there electric light, telephone, telegraph, police signal, and other wires; that telephone wires were sometimes insulated and sometimes not insulated.”

It appeared that the alternating electric light wires did not resemble any wires used by other companies, except the police signal wires. The plaintiff testified in substance that he noticed the big bunch of wires, by which he must have meant the first group, but that he did not recollect noticing the others. All he remembered was that there was a big body of wires, and that he had to stoop in order to clear them, but he cleared them, and went to the edge of the roof and looked down; that he could not say whether there were any wires on his left or not; that he noticed that there were different kinds of wires on the roof after he got on to it; that the only safe rule to follow was to treat every wire as dangerous; that he was very careful not to touch any wire on a roof, because he was liable to get a shock; that even telegraph or telephone wires sometimes got across wires having

a dangerous current and became dangerous; and that the roof on which he was standing was a copper roof, which was a conductor, and made what is called a "ground." It was admitted that the defendant was transmitting through these alternating wires an electric current of one thousand volts, which was dangerous under certain conditions; but it was contended that, to make such a current dangerous, the person touching a wire must be "grounded," as it is called, that is, be connected with the earth by substances that are conductors of electricity, while the other wire of the circuit must be grounded at the same time.

The accident happened in the morning of March 10, 1890, when it was broad daylight. The jury found, in answer to a question submitted to them, that the plaintiff at the time of the injury was upon the roof of No. 41 Temple Place by the implied permission or license of a person having authority to grant such permission or license. The presiding justice ruled that the plaintiff could not under his declaration "claim that the defendant was unlawfully or without right maintaining the alternating wires in the position in which they were at the time of the accident, reserving, however, to the plaintiff the right to claim that the defendant negligently maintained said wires in such position." He also ruled "that there was no evidence of any invitation, express or implied," held out to the plaintiff by the owners of the building No. 41, and no evidence of any preparation or adaptation of the building by the owners for the plaintiff's use; and that, "if the plaintiff was a mere licensee, the defendant, if liable at all, was not liable for mere omission on its part to exercise reasonable care as to the position or condition of the wire which caused the plaintiff's injury, but would be liable only for acts of commission, and refused to rule that there was no evidence of any such act of commission." He also ruled "that a mere licensee going upon another man's land must take the premises as he finds them, subject to all their concomitant conditions and perils; and that, if the plaintiff was a mere licensee, in order to recover he must show some change or alteration in the condition of the premises or wire thereon whereby injury may arise to persons being upon the roof in question, that such change or alteration occurred during the existence of

the license in question, and that the plaintiff had no notice of such change or alteration." He also ruled that, if the plaintiff was on the roof of the building No. 41 as a trespasser, upon the evidence in this case he would not be entitled to recover. If the plaintiff was a licensee, he stated the law as follows: "The law is, that as between a licensee and the owner of the premises, where as against the owner of the premises he is a mere licensee, he has to take the premises in the condition in which he finds them. He occupies them as a licensee — pure licensee — at his own risk, unless, perhaps, in the case of some concealed trap. Now, the defendant claims that at most he was only a licensee, if he was that, and it claims that this same doctrine which applies as between the licensee and the owner of the premises applied between the plaintiff and it as the owner and maintainer of these electric wires, — that is what it claims. And so it says there was no duty from it to the plaintiff. Now the plaintiff claims something more. He claims there was more than that; that whatever might be his relation to the owners of the Youth's Companion building, yet that he was on that building by the permission of the owners, so that he was not a trespasser, was not there unlawfully, and that then, as between him and the defendant, a new element enters; the plaintiff claims that the defendant placed the electric light wires on the building in Temple Place, where they were when the plaintiff was injured, and had full control of them at that time, that is, the defendant had full control of them at that time; that through some of these wires thus placed there passed in their ordinary and daily use alternating currents of electricity, which, under such conditions as were liable to happen and might reasonably be expected to occur, became dangerous to human life and safety; that this was known, or reasonably ought to have been known, to the defendant and its servants, who put up and had charge of the wires; that there were also telegraph wires and telephone wires, with the defendant's knowledge and express or implied consent, attached to the same standard to which the wires of the defendant were attached, and at this place ran near the defendant's wires; and that the defendant and its servants knew, or with the exercise of ordinary prudence and attention would have known, that the servants of the telegraph and tele-

phone companies, whose wires were attached as aforesaid, would, in the usual course of their duty and employment, have occasion to come to said standard and in close proximity with the defendant's said wires, and that the natural and probable consequence might be that unless the defendant used due and proper care in respect to its said wires, the said servants of the said telephone and telegraph companies, while in the usual course of their employment and duty as aforesaid, and though in the use of due care themselves, might be injured by said wires and the electric currents thereof. That is what the plaintiff claims. And what is the result? If the plaintiff satisfies you that these claims are well founded, and that the plaintiff at the time and place of his injury was a servant of the telephone company, was lawfully on said building, and then and there rightfully acting in the course of his employment, and where the defendant ought reasonably to have anticipated he might be, then the defendant owed him some duty in regard to its said wires." That duty the presiding justice afterwards defined as "the duty to use reasonable and ordinary care in respect to the condition of these wires and the location of them. . . . The defendant must use reasonable and proper care in the kind of wire it uses, in the care it takes of it while in use, and in regard to the location in which it maintains it."

Under this statement of the law, the claim of the plaintiff was in effect that the alternating electric light wires were not properly insulated; that at the particular place where the plaintiff touched one of them the insulation had been carelessly allowed to be worn off; and that the wires were placed in a position so near to the roof that a person on the roof would naturally come in contact with them. The jury must have found that there was a license or permission given by the defendant to the Telegraph and Telephone Company to attach its wires to its standard on the building No. 45 Temple Place. The principal questions argued are, whether the defendant owed the Telegraph and Telephone Company and its servants any duty in regard to the proper insulation or position of its wires at the place where the wires ran over the roof of the building No. 41, and if it did, whether the plaintiff in going to the side of the roof as he did to look down upon the roof of No. 45 for the purpose of find-

ing out how he could get down upon it, was in the exercise of due care.

The first prayer of the defendant for instructions raises the question whether, upon all the evidence, the plaintiff can recover. We doubt if the plaintiff offered sufficient evidence that he was in the exercise of due care at the time and place of the accident. It was daylight, the wires were visible, and the plaintiff knew that some of the wires might be dangerous. If we assume that as against the owner of the building No. 41 he was rightfully on the roof of that building for the purpose of going down upon the roof of the building No. 45, there was on the side of the roof a long distance unobstructed over which he could have looked down with safety. The plaintiff could look down upon the roof of No. 45 in his own way, and the safe place to do this was obvious. Instead of selecting a safe place, he unnecessarily stooped under some wires which he saw and knew might be dangerous, without noticing another set of wires lower down which were in plain sight. In consequence of this conduct, his hand accidentally came in contact with one of the alternating electric light wires at a point where the insulation was worn off, and he received his injury. If necessary to the decision, it would certainly deserve consideration whether this conduct does not show an unnecessary exposure to a danger which the plaintiff knew, or ought to have known. See *Lothrop v. Fitchburg Railroad*, 150 Mass. 423. Without determining this question, however, we are of opinion that the defendant, on the evidence, owed no duty to the plaintiff to have its wires properly insulated at the place where he received his injury, or to have its wires at that place supported so far above the roof of the building No. 41 that the plaintiff would not come in contact with them when on that roof. On the evidence recited in the exceptions, the most favorable inference for the plaintiff is that the Telegraph and Telephone Company was permitted by the defendant to use its standard on the building No. 45 Temple Place, and that therefore the plaintiff, as the servant of the Telegraph and Telephone Company, engaged in its business, had an implied license from the defendant to go upon the roof of this building and attach telegraph and telephone wires to its standard. Whatever may be the duty of the defendant toward its licensees, it must be

confined, we think, to licensees when acting within the scope of the license, and the defendant had no reasonable ground to expect that the servants of the Telegraph and Telephone Company would approach this standard in the way used by the plaintiff. If the presumption is that the defendant maintained this standard on the roof of the building No. 45 by contract with or permission of the owner of that building, the inference would be that it had a license from the owner to go through his building upon the roof for the purpose of reaching the standard and attaching wires to it, and this license might be available to the servants of other companies which were permitted to use the standard, if the standard was erected or maintained by the defendant for the use of other companies as well as of itself. *Doty v. Gorham*, 5 Pick. 487. This was the most direct way of reaching the roof of No. 45, and was the way provided by the owner of the building for reaching the roof, and there was nothing in the situation of this and the adjoining buildings indicating that the roof of building No. 41 was to be used for the purpose of reaching the roof on No. 45. The right to go upon the roof of No. 41 for this purpose could only be derived from the owner or occupant of that building. Whatever may be the duty of the defendant in stringing its wires over the roof of No. 41 to the owner of that building and his servants, we see no evidence that the defendant intended to authorize the use of this roof by the Telegraph and Telephone Company, or had any right to permit the servants of that company to go upon it. Whatever duty on the evidence the defendant owed to the plaintiff as servant of the Telegraph and Telephone Company, under its license to that company to use the standard for the support of telegraph or telephone wires, this duty cannot be held to extend over the whole circuit of the defendant's wires, and the defendant was not required, for the protection of the servants of the Telegraph and Telephone Company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed, at places where the defendant had no reason to expect that the servants of that company would go in the performance of their duties in using its standard, and where the defendant had neither invited nor licensed them to go.

The first two counts of the declaration are at common law; the third count is under Pub. Sts. c. 109, § 12, and St. 1883, c. 221. The court required the plaintiff to elect whether he would rely upon the first and second counts, or upon the third, and he elected to rely upon the first and second. As the exceptions must be sustained, and there may be a new trial, it is proper to notice the contention of the plaintiff under the third count, as in the event of another trial the plaintiff may rely upon that count. The Pub. Sts. c. 109, § 12, provide that, "when an injury is done to a person or to property by the posts, wires, or other apparatus of a telegraphic line, the company shall be responsible in damages to the party injured," etc. St. 1883, c. 221, is as follows: "All provisions of law granting to persons and corporations authority to erect, lay, and maintain, and to cities and towns authority to regulate, telegraph and telephone lines, except sections sixteen and eighteen of chapter one hundred and nine of the Public Statutes, shall, so far as applicable, apply to lines for the transmission of electricity for the purpose of lighting." This last statute relates solely to the authority to erect, lay, and maintain lines for the transmission of electricity for the purpose of lighting, and to the regulation of such lines; it does not relate to the liability of electric light companies for injuries received by any person from the posts, wires, or other apparatus of such companies. This renders it unnecessary to consider whether § 12 of Pub. Sts. c. 109, was intended to include injuries received from an electric current transmitted through wires. It has been argued that this could not have been intended by this section, as telegraph currents are not dangerous.

In the view we have taken of this case, the questions arising on the demurrer need not be determined.

Exceptions sustained.

WILLIAM H. ZINN vs. WILBUR P. RICE.

Suffolk. November 24, 1893. — June 22, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Abuse of Legal Process — Excessive Attachment — Exceptions — Instructions as to Malice — Attorney — Measure of Damages.

A point not taken at the trial in the Superior Court on the merits is not open on a bill of exceptions.

At the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, in the instructions, not excepted to, as to the defendant's personal conduct, malice was defined as acting in bad faith, and the jury were told that if the defendant, with the design to injure or oppress, by fixing an excessive *ad damnum*, went beyond what he believed to be necessary to secure the payment of the judgment which he might recover, by forcing payment of a sum larger than would otherwise be paid, he was not acting in good faith, and that that would warrant an inference that he was acting maliciously, and in the instruction excepted to they were told to apply the same test to the conduct of the attorney, and the substance of the instruction was that the defendant was as responsible for such malice on the part of his attorney as for his own. *Held*, that under the circumstances the instruction did not harm the defendant.

At the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, evidence was admitted, subject to the defendant's exception, of inquiries about the attachment made of the plaintiff by mercantile agency reporters and by people who sold him goods, of conversations of neighbors with his superintendent and inquiries by them and by the employees as to what the attachment meant, of the fact that a creditor attempted to collect through a lawyer a debt of which payment had been remitted to the creditor on the day it was due, of a copy of a mercantile paper containing a notice of the attachment with evidence of the circulation of that paper, and also of the reports of commercial and trade agencies as to the attachment. *Held*, that all the circumstances which the evidence tended to show were natural results of the defendant's act in making the excessive attachment, and tended to prove damage resulting in an injury to his business, and that, as none of the acts were wrongful acts of third persons, it was not necessary to consider what difference it would have made if the acts shown as tending to prove loss of credit or injury to trade had been wrongful acts of others. *Held, also*, that if the mercantile paper and the agency reports had been inadmissible for any purpose, the fair construction of that part of the charge which forbade the jury to allow damages for any acts giving currency to the fact that an excessive attachment had been made if such acts were not authorized by the defendant, as no request for a specific withdrawal of the evidence was made, is that the evidence was itself understood to have been withdrawn from their consideration.

While at the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, a wide range of evidence may be admissible, in the discretion of the pre-

siding justice, upon the injury caused to the value of the plaintiff's business considered as a whole, and to what is called its good will, yet he cannot show the course of his business from its inception down to the time when he sold it out, eleven months after the date of the attachment, which included a period of nine years prior to the attachment, during the first two of which he had a partner, and in the nine years his connecting stores had come to have twenty-four departments; nor can he testify that there had been a steady and large increase in the business year by year, but that the increase in 1889, in February of which year the attachment was made, was as a whole less than the increase for January of that year, so that the business for the part of the year subsequent to the attachment decreased.

If at the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, pneumonia from which the plaintiff suffered can be in any way shown to be a natural and probable consequence thereof, a point upon which this court expresses no opinion, it cannot be so shown by the testimony of one who has no special knowledge of the subject.

TORT, for alleged abuse of legal process. Writ dated April 8, 1889. At the trial in the Superior Court, before *Dunbar, J.*, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which sufficiently appear in the opinion. Other counsel than those for the defendant made the attachment in the original case.

R. M. Morse, (*G. P. Wardner* with him,) for the defendant.

C. W. Bartlett & B. L. M. Tower, for the plaintiff.

BARKER, J. The defendant contends that there was error in the admission and exclusion of evidence, and also in the instruction that, if the attorney acted maliciously when the matter was left with him for the purpose of bringing suit, the defendant was responsible for the malicious acts of his attorney in levying the excessive attachment, and must respond in damages in the same way as if the malice had been that of his own personal creation and exertion.*

* The plaintiff offered in evidence at the trial the writ in the suit of *Wilbur P. Rice v. William H. Zinn*, dated February 7, 1889, in which the *ad damnum* was laid at \$40,000, and the return of service thereon, from which it appeared that on February 9 the defendant Zinn's real estate in Middlesex and Suffolk counties was attached, and that on February 12 an attachment was placed on the stock of goods in his store on Washington Street, Boston. On February 13, on application to the Superior Court, the attachment was ordered to be reduced to \$10,000, in which sum a bond with sureties was given on the same day. Zinn had no real estate in Suffolk County, but owned the equity in certain land and buildings in Somerville.

The officer who made the attachment in Zinn's store left in charge a

1. The defendant now contends that, if his attorney without his knowledge or authority, and to gratify the personal malice of the attorney, made an excessive attachment, the defendant is not liable therefor; and that the distinction between the liability of a master for the malicious act of the servant in the course of his employment, and for the malicious act of the servant to gratify his personal malice, was not clearly presented in the instructions. Without discussing the distinction for which the defendant contends, it is enough to say, in overruling his exception, that the bill of exceptions discloses no evidence of personal hatred or ill will on the part of the attorney, or that he took advantage of his employment to secure any private end or advantage of his own, or to gratify his own personal malice; and no request was made for instructions upon the point now relied upon, either before or after the instruction excepted to was given. The presiding justice was not called upon to deal with the precise question now raised, and, whatever may be the true rule to be applied where there is evidence that an agent has acted to gratify his own personal malice, the omission to deal with it in the instruction was not error. In the instructions not excepted to as to the defendant's personal conduct, malice had been defined for the purposes of the case as acting in bad faith, and the jury had been told that if the defendant, with the design to injure or oppress, by fixing an excessive *ad damnum*, went beyond what he believed to be necessary and proper to secure the payment of the judgment which he might recover, by forcing payment of a sum larger than would otherwise be paid, he was not acting in good faith, and that that would warrant an inference that he was acting maliciously. In the

keeper, who remained there for about twenty-four hours, when the officer appointed in his place, as keeper, Zinn's superintendent. No attempt was made at any time to interfere with the sales in the store, and no goods were actually removed or touched.

The attachment was removed on the morning of the 14th. No declaration was inserted in the writ when delivered to the officer for service, but the same was subsequently filed when the case was entered in court. The declaration alleged a breach of contract by Zinn in failing to pay a balance due Rice for the construction of ten houses in Somerville for the sum of \$22,250, the balance claimed to be due under the contract and for extras, being about \$4,300.

instruction excepted to, they were told to apply the same test to the conduct of the attorney, and the substance of the instruction was that the defendant was as responsible for such malice on the part of his attorney as for his own. Under the circumstances, this did not harm the defendant. See *Levi v. Brooks*, 121 Mass. 501; *Shattuck v. Bill*, 142 Mass. 56.

2. Evidence was admitted, subject to the defendant's exception, that inquiries about the attachment were made of the plaintiff by mercantile agency reporters and by people who sold him goods; also evidence of conversations of neighbors with the superintendent of the plaintiff's store, and inquiries by them and by the employees as to what the attachment meant; also of the fact that a creditor attempted to collect through a lawyer a debt of which payment had been remitted to the creditor on the day it was due; also a copy of *The Banker and Tradesman*, a mercantile paper, containing a notice of the attachment, with evidence of the circulation of that paper; and also evidence of the reports of commercial and trade agencies as to the attachment. Speaking generally of the evidence so admitted, all the circumstances which it tended to show were natural and probable consequences to be reasonably expected to result from the defendant's act in making the excessive attachment, and tending to prove damage resulting in an injury to his business. None of the acts appear to have been wrongful acts of third persons, and it is not necessary to consider what difference it would have made if the acts shown as tending to prove loss of credit or injury to trade had been wrongful acts of others. See *Hayes v. Hyde Park*, 153 Mass. 514, 516, and cases cited; *Elmer v. Fessenden*, 151 Mass. 359, 362, 363. If *The Banker and Tradesman*, and the agency reports had been inadmissible for any purpose, the fair construction of that part of the charge which forbade the jury to allow damages for any acts giving currency to the fact that an excessive attachment had been made if such acts were not authorized by the defendant, as no request for a specific withdrawal of the evidence was made, is that the evidence was itself understood to have been withdrawn from their consideration.

3. In that branch of the case bearing particularly on the amount of the plaintiff's damages, we think there was error in

the admission and rejection of evidence. We assume that a legitimate element of the plaintiff's damages was the injury caused to the value of his business, considered as a whole, and to what is called its good will, and that in dealing with such a question a somewhat wide range of evidence may be admissible, in the discretion of the justice who presides at the trial. But here the plaintiff was allowed to show the course of his business from its inception down to the time when he sold it out, some eleven months after the date of the attachment. This included a period of nine years prior to the attachment, during the first two of which the plaintiff had a partner, and in the nine years his connecting stores had come to have twenty-four departments. He was permitted to testify that there had been a steady and quite large increase in the business year by year since he had been in business, but that the increase in the year 1889 was, as a whole, less than the increase for January of that year, so that the business for the part of the year subsequent to the attachment decreased.

In the first place, the field of inquiry thus opened is so broad as to make it reasonably certain that the circumstance of a constant increase in the volume of trade during the nine years when additional stores and departments were brought into the business must have been due in great part to causes which the attachment could not affect. To put upon the defendant the burden of identifying such causes, and showing to what the increase in remote years was due, was unreasonable. In the next place, the decrease in the volume of business after the attachment does not seem to be a natural and probable consequence of the excessive attachment, which had no natural tendency to drive away purchasers, as it was made on the 12th and dissolved on the 14th day of February, and which never closed the plaintiff's stores or stopped trade in them. The connection between the supposed cause and the result is not sufficiently close, and too many other elements enter into the matter; for example, the methods of business pursued before and after the attachment, the amount of advertising done, changes in clerks and other employees, the amount of pains and attention given to the business, and the state of trade in general. It is inconceivable that a prosperous business

was converted into an unprosperous one by the mere fact that an attachment which never closed the stores, and which was in force but two days, was for the amount of forty thousand dollars rather than for ten thousand. The diminution of business is not traceable to such a cause. In our opinion, so wide a range of evidence should not have been allowed. This makes it necessary to sustain the defendant's exceptions. Whether the price for which the plaintiff sold out will be admissible in another trial we do not decide. It was admissible when offered by the defendant, because, the whole course of the business having been admitted in favor of the plaintiff, the final sale which summed up the transaction was relevant to the question whether the value of the business had been diminished.

There was also error in allowing the plaintiff to testify that the amount of the attachment was the cause of the pneumonia with which he was attacked upon the conclusion of a journey from New Jersey to Boston, made four days after the attachment had been dissolved. If that disease can be in any way shown to be a natural and probable consequence of the making of an excessive attachment of goods, a point upon which we express no opinion, it cannot be so shown by the testimony of one who has no special knowledge of the subject.

Exceptions sustained.

EDWARD M. ALDEN & another vs. SAMUEL C. HART
& another.

Suffolk. January 11, 1894. — June 22, 1894.

Present: FIELD, C J., ALLEN, MORTON, & BARKER, JJ.

Sale — Implied Warranty of Quality — Rescission of Contract.

In a commercial contract for the sale and delivery of a cargo of coal, there is an implied warranty that it shall be of merchantable quality.

If it be assumed that in a commercial contract for the sale and delivery of a cargo of coal the title to the coal passed to the vendee when it was selected by the vendor, laden on board a barge designated by the vendee, and bills of lading therefor were given to the vendor under which the cargo was to be delivered to the vendee, he paying the freight, such a title was conditional on the coal being

found to be of the quality purchased, and, if upon examination the coal did not conform to the implied warranty that it was merchantable, the vendee was entitled to reject it.

In a commercial contract for the sale and delivery of a cargo of coal laden on board a barge designated by the vendee, the only bill of lading received by the vendee was one to which the captain of the barge was entitled, and which, he having sailed before it was completed, was forwarded for his use to the consignee, who was the vendor, and by him sent with the invoice to the vendee. The captain, on arrival, demanded the bill of lading of the vendee, who delivered it to him, after having made upon it the customary indorsements of the arrival of the barge ready to discharge, and of its afterward being towed from the vendee's wharf and anchored in the stream. The vendee immediately upon the arrival of the barge examined the cargo, found it unsatisfactory, and gave notice to the vendor that he refused to receive it, and the vendor, upon examination, admitting it to be unsatisfactory, attempted to dispose of it elsewhere. *Held*, that, assuming the title to the coal to have passed to the vendee, subject to examination and acceptance or rejection by him, he had done everything necessary to a rescission of the contract.

CONTRACT, to recover the value of a cargo of coal. Writ dated September 6, 1892.

Trial in this court, without a jury, before *Barker, J.*, who found for the defendants, and, at the request of the plaintiffs, reported the case for the consideration of the full court, in substance as follows.

On June 29, 1892, in a conversation by telephone, the plaintiffs and defendants made an oral bargain for the sale and purchase of a cargo of Barton coal, and on the same day the plaintiffs wrote the defendants a letter, in which, after recapitulating the conversation, they said, "We also told you that we could enter your order for 750 tons shipped per Bee Line barge for immediate shipment . . . f. o. b. Weehawken. We have sent the order forward. You can cancel this to-morrow if you find you have not room for it, but we must ask you to *telegraph* us the *first thing in the morning*, so that we may know just where we stand. We would say that 'Barton' coal is second to no free burning coal mined, both as regards quality and preparation."

In response to this letter the defendants telegraphed, "You may ship the cargo to us at once."

On June 30, the plaintiffs wrote to the defendants, "Your despatch (You to ship cargo to us at once) received. Order has been entered and accepted, and cargo will be shipped promptly."

The defendants, in the telephone conversation of June 29, in
VOL. 161.

reply to a question of the plaintiffs as to how the cargo should be shipped, replied, "By the Bee Line of Barges."

The cargo of coal, the parties understood, was not in Boston nor in New Bedford, nor then existing as a cargo, but was to be loaded and shipped from Weehawken, New Jersey, and was to be taken to New Bedford, the defendants paying the freight. By custom, duplicate or triplicate bills of lading were made out, one of which was for the master of the barge.

On July 20, 1892, the coal was shipped on board a barge of the Bee Line Company at Weehawken, and consigned to the defendants at New Bedford, neither the plaintiffs nor the defendants having seen the coal at Weehawken. The master left the wharf before the bills of lading were complete, and directed his copy to be sent to the consignee for him. On July 22 the plaintiffs forwarded to the defendants an invoice, and the captain's bill of lading, marked "Captain's B/L," which the judge found was the only one sent to the defendants. It contained the following indorsements: "Arrived ready to discharge, Wednesday, July 27th, at 7 A. M." "Towed from Hart & Akin's wharf and anchored in stream, Wednesday, August 10th, at 8 A. M."

The defendants received the invoice and bill of lading, and entered them upon their books, but held the bill of lading for the captain of the barge, and delivered it to him subsequently, in accordance with the custom of the port, when the barge was towed into the stream. The barge arrived in New Bedford on the evening of July 26. Early on the morning of the 27th the captain reported to the defendants, and offered to discharge the cargo. The hatches were removed, and the defendants' laborers made preparations for discharging the vessel; but before beginning to discharge, the defendants went on board the barge, a little before seven o'clock, and, upon inspection of the cargo, stopped all proceedings for discharging the vessel, and telegraphed to the plaintiffs, "Bluebird arrived, condition cargo unsatisfactory, we refuse the cargo."

The plaintiffs immediately replied by telegraph, "Alden will be at your office to-day at one forty-five."

After telegraphing, at about eight o'clock of the same morning, the defendants, at the request of the master of the barge, and in accordance with the custom of the port, indorsed on the

bill of lading, "Arrived ready to discharge, Wednesday, July 27th, at 7 A. M."; and on the same day the defendants and the plaintiffs had an interview at New Bedford. At this interview Hart and Alden went on board the barge and examined the cargo of coal. Hart thereupon told Alden that the cargo of coal was not such coal as they had bought, and that they would not take it, and would not under any circumstances receive it; that it was not merchantable coal, and that they would not have it. Alden expressed himself that the coal was not of the quality it should have been, nor was it such quality of coal as he had sold him, and it did not correspond to the representation. Alden said he would try to sell the cargo to other parties, and thereupon called upon other persons and offered to sell the cargo. Alden afterwards saw the coal several times, inspected and examined the same, visited the coal dealers in Taunton, Attleborough, Brockton, Whitman, places on Cape Cod, and other places, and made various attempts to sell the said cargo, but did not succeed.

On July 30, 1892, the defendants wrote to the plaintiffs: "Since your Mr. Alden was here the writer has more carefully than before examined the cargo coal of barge Bluebird, and fully confirmed our first examination and report. The coal is poorer in quality and preparation than at first we believed it to be. We shall want the berth where the Bluebird lies early next week."

The barge lay at the defendants' wharf until August 10, when it was towed into the stream, and at that time the captain demanded the bill of lading as his, and the defendants delivered it to him, after having indorsed upon it, in accordance with the custom of the port, "Towed from Hart & Akin's wharf, and anchored in stream, Wednesday, August 10th, at 8 A. M."

From July 27 to August 19 the plaintiffs were trying to sell the cargo, and made no claim on the defendants therefor. On August 19 they wrote to the defendants, "If you positively refuse to take the cargo of coal shipped per barge Bluebird, July 20, we shall sell the same at once for your account, and shall charge you with all losses that may be made."

To this, on August 20, the defendants replied, "In reply have to say that we refused to take the cargo of coal per barge Blue-

bird (invoice dated July 20, 1892), to your Mr. Alden, on his visit here July 27, 1892, this being the day the Bluebird arrived at our wharf."

The barge remained in the stream some weeks, until the owners libelled the coal for freight and demurrage in the admiralty court, and the coal was sold under these proceedings to satisfy their claim.

The judge found, as matter of fact, that the coal was not merchantable coal, and ruled that the defendants had a right to reject it on its arrival at New Bedford.

The plaintiffs requested the judge to rule, in case he should find that the coal was not merchantable, that the only remedy the defendants had was by recoupment or reduction in the price to the actual value of the coal. They further requested the judge to rule, that the defendants had no right to refuse to accept the cargo at New Bedford, or to there tender the same back to the plaintiffs; and that in order to re-vest the title in the plaintiffs it was necessary for the defendants to assign the bill of lading or tender the plaintiffs a release of all interest in or claim to the cargo. But he declined so to rule, and ruled that the defendants had the right to refuse to accept the cargo at New Bedford without tendering back the bill of lading and the invoice, or either of them, and without assigning or transferring to the plaintiffs any interest or legal title in the coal which was or might be in the defendants; and the plaintiffs excepted.

A. H. Russell, for the plaintiffs.

E. L. Barney, (*E. J. Hadley* with him,) for the defendants.

FIELD, C. J. There was an implied warranty that the coal should be merchantable. *Murchie v. Cornell*, 155 Mass. 60. The report recites that the court, trying the case without a jury, found as a fact that the coal was not merchantable, and ruled, against the plaintiffs' objection, that the defendants had the right to reject the coal on its arrival at New Bedford. We think that this ruling was right. *Pope v. Allis*, 115 U. S. 363. *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261. *Bryant v. Isburgh*, 13 Gray, 607. *Wiley v. Athol*, 150 Mass. 426, 434. *Smith v. Hale*, 158 Mass. 178. *Grimoldby v. Wells*, L. R. 10 C. P. 391. Whether, in such a case as this, the title to the property passes to the

vendee when the coal is delivered on board the barge, is not free from doubt, and we have not found it necessary to decide the question. See *Stanton v. Eager*, 16 Pick. 467; *Tyler v. Currier*, 13 Gray, 134; *Claflin v. Boston & Lowell Railroad*, 7 Allen, 341; *Gardner v. Lane*, 9 Allen, 492; *S. C.* 12 Allen, 39, 48; *Prince v. Boston & Lowell Railroad*, 101 Mass. 542; *Merchants' National Bank v. Bangs*, 102 Mass. 295; *Odell v. Boston & Maine Railroad*, 109 Mass. 50; *Harvey v. Harris*, 112 Mass. 32; *Franck v. Hoey*, 128 Mass. 263; *Lord v. Edwards*, 148 Mass. 476; *Smith v. Edwards*, 156 Mass. 221.

If it be assumed in favor of the plaintiffs that the title to this coal passed to the defendants when it was selected by the plaintiffs and laden free on board upon the barge at Weehawken, and when bills of lading were given to the plaintiffs under which the cargo was to be delivered to the defendants or their assigns at the port of New Bedford, they paying the freight, we are yet of opinion that the rulings at the trial were correct. If the title passed to the defendants it was a conditional title, and the condition was that the coal should be found to be of the quality purchased, and the defendants could reject the coal if upon examination it did not conform to the implied warranty that it should be merchantable.

The question is, on the assumption that the title passed to the defendants, whether the defendants did all required of them to revest in the plaintiffs the title to the coal. The report of the presiding justice recites that the plaintiffs requested him to rule that, "in order to revest the title in the plaintiffs it was necessary for the defendants to assign the bill of lading or tender plaintiffs a release of all interest in or claim to the cargo. But I declined so to rule, and ruled that the defendants had the right to refuse to accept the cargo at New Bedford without tendering back the bill of lading and the invoice, or either of them, and without assigning or transferring to the plaintiffs any interest or legal title in the coal which was or might be in the defendants", and to this ruling the plaintiffs excepted.

The court found that the only bill of lading sent to the defendants was the captain's bill of lading. This bill of lading was marked "Captain's B L." The captain demanded this bill of lading of the defendants, and they delivered it to him, after having made upon it the customary indorsements of the arrival

of the barge ready to discharge, and of its being afterwards towed from their wharf and anchored in the stream. The defendants immediately, upon the arrival of the barge examined the cargo, found it unsatisfactory, and gave notice to the plaintiffs that they refused to receive it. One of the plaintiffs thereupon came to New Bedford, went on board the barge, and examined the coal. The report then states that "Mr. Hart thereupon told Mr. Alden that the cargo of coal was not such coal as they had bought, and that they would not take it, and would not under any circumstances receive it; that it was not merchantable coal, and that they would not have it. Mr. Alden expressed himself that the coal was not of the quality it should have been, nor was it such quality of coal as he had sold him, and it did not correspond to the representation. Mr. Alden said he would try and sell the cargo to other parties, and thereupon called upon other persons and offered to sell the cargo. Mr. Alden afterwards saw the coal several times, inspected and examined the same, visited the coal dealers in Taunton, Attleborough, Brockton, Whitman, places on Cape Cod, and other places, and made various attempts to sell the said cargo, but did not succeed." Ultimately the owners of the barge libelled the coal for freight and demurrage in a court of admiralty, and the coal was sold under proceedings in the admiralty court to satisfy their claim. These facts show that the defendants tendered the cargo of coal to the plaintiffs and, so far as they could, delivered possession of it to the plaintiffs. The cargo was capable of manual delivery, subject to the barge-owners' claim for freight and demurrage. These facts also tend to show that the plaintiffs accepted this tender, and assumed control of the cargo; but whether they did or not, they could have accepted it and acquired possession, subject to the lien of the owners of the barge for freight and demurrage. The defendants retained no bill of lading, and therefore could have indorsed none to a purchaser, and the retention of the invoice is immaterial. Assuming that the title to the coal had passed to the defendants subject to examination and acceptance or rejection by them, we think that everything was done by them necessary to a rescission of the contract. See *Grimoldby v. Wells*, L. R. 10 C. P. 391. Whether something less than was done would not have been effectual need not be considered.

Judgment on the finding.

EDWARD M. ILLINGSWORTH vs. BOSTON ELECTRIC LIGHT
COMPANY.

Suffolk. January 16, 1894. — June 22, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

*Personal Injuries caused by Wires of Electric Light Company — Evidence —
Due Care.*

In St. 1890, c. 404, § 1, requiring persons or corporations owning or operating a line of wires over streets or buildings in a city suitably and safely to attach the wires to strong and sufficient supports, the words "and insulate them at all points of attachment" mean at the point of attachment to the supports.

In an action by a lineman employed in the fire alarm service of the city of Boston against an electric lighting company for injuries received from contact with one of its wires charged with electricity and left uninsulated, at a point close to a frame structure owned by the defendant, and standing upon the roof of a building owned by a third person, to the arms of which the company's wires and those of the fire alarm service were attached, and upon which the plaintiff in the performance of his duty was required to go, evidence is admissible, as having some tendency to show that the wires of the fire alarm service were attached to the structure by the permission of the defendant, and under some contract with it whereby the city was to pay a portion of the expense of the maintenance of such structure, that a bill was rendered by the defendant to the city of Boston and paid by it for its proportionate part of the expense of repairing the roof upon an adjoining building where there was another structure belonging to the defendant, and from which its wires and those of the fire alarm service extended to the structure where the accident happened.

When several corporations use the structures owned by one of them as supports for separate lines of wire each carrying dangerous currents of electricity, it is the duty of the owner of the structures, at common law, in the absence of any agreement on the subject other than such as is involved in its permission to the others to use such structures on payment of compensation, to exercise reasonable care in seeing that its wires are kept, so far as is practicable, in a safe condition at such places as the servants of the others are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to such structures.

The plaintiff was employed in the fire alarm service of the city of Boston, which, under an agreement with an electric lighting company, used the structures owned by the company as supports for its lines of wire. There was evidence that, while the plaintiff in the performance of his duties was descending from one of such structures, his pliers which he carried in his belt caught on a wire belonging to the company, and that in reaching around to clear them he received injuries by the contact of his hand with a joint of the wires left without insulation at a point within twelve or fifteen inches of the structure. *Held*, in an action against the company, that the defendant was negligent in leaving the joints of its wires without insulation at such a point, and that the catching

of the plaintiff's pliers, or his reaching around to clear them, did not necessarily show negligence, and that the question whether he was in the exercise of due care should have been submitted to the jury. *Held, also*, that, as the plaintiff was not a servant of the defendant, it could not be said that he took the risk unless he knew of it and voluntarily exposed himself to it.

Although mere contact with one wire charged with electricity which is bare and uninsulated may cause no injury unless other conditions supervene, yet the fact, if it be true, that other circumstances must occur to render such contact dangerous cannot excuse the company or persons operating the wires from taking reasonable care to have them properly insulated at points where the servants of others have the right of coming near to or in contact with the wires.

TORT, for personal injuries resulting from contact with a wire charged with electricity. Writ dated January 9, 1892.

At the trial in the Superior Court, before *Aldrich, J.*, there was evidence tending to show that at the time of the accident, which happened on May 11, 1891, the plaintiff was employed as a lineman in the fire alarm department of the city of Boston, and that, acting under orders of the foreman of the department and in the course of his duties, he ascended an upright frame structure owned by the defendant erected upon the roof of the building numbered 114 Sudbury Street in Boston, owned by a third person, to the lower arms of which the defendant's wires were attached, while to the upper arms were attached the wires of the fire department; that after he had completed his work and was descending from the structure, the pliers which he carried in his belt caught on a wire belonging to the defendant, and in reaching around to clear them he touched a charged wire and received a shock that threw him to the roof. The plaintiff's hands were severely burned by the electricity, and his head was injured by the fall.

One Flavel, a fellow workman of the plaintiff, testified that he examined the wires of the defendant immediately after the accident, and saw two bad joints that were bare, and were not taped or insulated, and that these joints were about twelve or fifteen inches from the structure to the arms of which the defendant's wires were attached, and that the rest of the wire was insulated.

The plaintiff offered in evidence a bill rendered by the defendant to the city of Boston, and paid by it, charging said city a proportionate part of repairing the roof upon an adjoining building, where there was another frame of the defendant, and from which the wires of the defendant and said city extended to

and were fastened upon the defendant's frame where the plaintiff was injured. The evidence was admitted, and the defendant excepted.

One William Brophy, an electrical expert, testified for the defendant that alternating currents were used on its wires; that a person taking hold of a perfectly insulated wire would not receive sufficient electricity to injure him; that the defendant used as good insulation on its wires as could then be had in the market; and that the accident might have happened if the wires of the defendant had been in as good condition as skill and knowledge could have made them.

The undisputed evidence was that mere contact with one electric light wire, even though bare and uninsulated, would cause no injury, unless other conditions supervened.

At the conclusion of the evidence the defendant requested the judge to rule that the action could not be maintained. The judge ruled as requested, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

S. D. Charles, for the plaintiff.

H. N. Sheldon & C. A. Snow, for the defendant.

FIELD, C. J. The exceptions recite that the court ruled that there was no evidence for the jury, and ordered a verdict for the defendant. The questions argued relate to the liability of the defendant on the evidence, under Pub. Sts. c. 109, § 12, and St. 1883, c. 221; under St. 1890, c. 404, § 1; and at common law.

There is no evidence of any liability under Pub. Sts. c. 109, § 12, and St. 1883, c. 221. *Hector v. Boston Electric Light Co.*, ante, 558.

We have no occasion to consider whether it was the intention of St. 1890, c. 404, to give a private person a cause of action for any violation of the first section of that statute, if, in consequence of such violation, such person suffers damage in his person or property. The only provision of that statute which it is contended applies to this case is the requirement that such a corporation as the defendant should suitably and safely attach its wires to strong and sufficient supports, "and insulate them at all points of attachment." This must mean at the points of attachment to the supports. The provision probably relates to

the pins or insulators, or other equivalent devices, by which electric wires are usually attached to supports. There is no evidence recited in the exceptions of any defect in the insulation of the wires of the defendant at the points of attachment to the support.

There was evidence of "two bad joints" on these wires about twelve or fifteen inches from the frame to one arm of which the defendant's wires were attached. These joints "were not taped or insulated," but "the rest of the wire was insulated." We infer that this is evidence that these joints never had been insulated in any manner. As the evidence was that "the plaintiff's hands were severely burned by the electricity," it was competent for the jury to find that the plaintiff's hands had touched a wire or wires of the defendant. On all the evidence in the case we think they might have found that his hand or hands touched the defendant's wires at one or both of the joints where the wire was not insulated. It is true that a witness for the defendant, an electrical expert, testified "that this accident might have happened if the wires of the defendant had been in as good condition as skill and knowledge could have made them," but the jury might have disbelieved this testimony, or, if they believed it, might also have believed that although such an accident was possible under certain conditions if the wires had been properly insulated, yet that it was much more likely to happen if the wires were not insulated. The same witness testified "that a person taking hold of a perfectly insulated wire would not receive sufficient electricity to injure him."

The evidence that a bill was rendered by the defendant to the city of Boston, and was paid by the city, "charging said city a proportionate part of repairing the roof upon an adjoining building, where there was another frame of the defendant, and from which the wires of the defendant and said city extended to and were fastened upon the defendant's frame where the plaintiff was injured," we think was properly admitted. It had some tendency to show that, by some arrangement between the defendant and the city of Boston, the city was paying a part of the expenses of maintaining the structures on buildings to which the wires of the defendant and those of the city were attached, and that therefore the city of Boston attached the wires of its

fire alarm service to the defendant's structure on the building numbered 114 Sudbury Street, where the accident happened, by permission of the defendant, and under some contract or arrangement whereby the city was to pay the defendant something for the maintenance of such structures.

The question then is, When two business corporations, or two persons under some agreement between themselves, use the same structures, owned by one of them, as supports for separate lines of wire used by each for the transmission of dangerous currents of electricity, what is the duty at common law which each owes to the other in regard to the care each must take to have its wires in a reasonably safe condition at or near the structures where the servants of the other have occasion to go, in the usual course of business, and where they must come near to or in contact with the wires? Such servants, when so employed, are more than mere licensees, taking advantage, for their own benefit or that of their employer, of the passive acquiescence of the licensor. If they are licensees at all, the license until it is revoked is coupled with an interest. The two corporations or persons have in a sense a common interest in the maintenance and use of the structures to which the wires of each are attached, and each, we think, should be under the same obligation to the other as persons having common rights in a place or passageway are under to one another not negligently to place a dangerous substance on the common territory, where it reasonably may be anticipated that others having common rights may be injured by it. The purpose for which the structures are used renders some danger from electrical currents inevitable, but the danger ought to be made as small as is practicable by the exercise of reasonable care.

In the absence of any agreement on the subject other than what is involved in the permission of the owner of the structures to the other to use them in common for the support of electric wires on paying some compensation, we are of opinion that the duty of the owner of the structures is to exercise reasonable care in seeing that his wires are kept, so far as is practicable, in a safe condition at such places as the servants of the other are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to such structures. Under

this rule, there was evidence for the jury that the defendant was negligent in leaving two joints of its wires without insulation within twelve or fifteen inches of the frame on which the plaintiff, in the course of his duty as a person employed in the fire alarm service of the city of Boston, was required or expected to go. We of course express no opinion upon the liability of the city for the condition of the wires of its fire alarm service.

It is contended that the plaintiff took the risk, or that he offered no evidence that he was in the exercise of due care. As the plaintiff was not a servant of the defendant, it cannot be said that he took the risk unless he knew of it and voluntarily exposed himself to it, and none of these things is necessarily to be inferred from the evidence. Whether he was in the exercise of due care, we think, was for the jury. It appears that the wires of the defendant were insulated, except at these two joints, and the plaintiff reasonably may have expected that the wires about the frame were entirely insulated, and we cannot say, as matter of law, that he was negligent in not seeing the uninsulated condition of these joints. It does not necessarily show negligence that his pliers got caught on another wire, although this may have been the cause of his injury. It was not necessarily negligent that he reached round with his hand to clear the pliers, although it may be that by this movement his hand was extended farther from the post to which the arms were fastened which held the wires than otherwise he would have extended it. We cannot say, as matter of law, on the evidence, that his hand or hands in this movement did not touch one or both of the joints, and that this was the cause of the injury.

The exceptions recite that "the undisputed evidence was that mere contact with one electric light wire, even though bare and uninsulated, would cause no injury, unless other conditions supervened," but there is no contention that these other conditions do not often occur. The fact that other conditions must occur to render contact with such wires dangerous, if it be true, cannot excuse the defendant from taking reasonable care, in view of all the circumstances likely to occur, to have its wires properly insulated at points where the servants of another have the right derived from the defendant of coming near to or

in contact with the wires. We are of opinion that the questions of the defendant's negligence and of the plaintiff's due care were for the jury.

Exceptions sustained.

SARAH M. PIPER vs. MERCANTILE MUTUAL ACCIDENT
ASSOCIATION.

Suffolk. January 18, 1894. — June 22, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Accident Insurance — Walking on Railroad Track.

Where the assured is killed while walking on the road-bed between the tracks of a railroad, when parallel to it is a sidewalk which he could have used, he is within that clause of the policy or certificate of the insurance company providing that "walking or being on the road-bed or bridge of any steam railway are hazards not contemplated or covered by this certificate," and the fact that many other people used the road-bed in the same manner is immaterial in an action against the insurance company upon the policy.

CONTRACT, upon a policy of insurance. Writ dated December 1, 1891. At the trial in the Superior Court, before *Braley, J.*, it appeared that the plaintiff was the widow of J. Ellery Piper, to whom, on December 31, 1886, a policy of insurance had been issued by the defendant, by which it promised to pay the sum of five thousand dollars to the widow of the assured if, during the continuance of the policy, his death was occasioned by bodily injuries effected through external, violent, and accidental means within the intent and meaning of the conditions recited in the policy. One of the conditions of the policy provided: "Entering or attempting to enter or leave any public conveyance using steam as a motive power while the same is in motion, or walking or being on the road-bed or bridge of any steam railway, are hazards not contemplated or covered by this certificate."

The assured, on April 28, 1891, while walking longitudinally on the road-bed between the tracks of the New York and New England Railway Company at Hyde Park, for the purpose of reaching the railway station, was struck by an engine and killed. There was a public way across the railroad at a short distance

from the station, and a walk parallel with the tracks extending from this way to the station which the assured could have used; but the place where he was walking was not fitted up as a way.

The plaintiff offered evidence, which was admitted without objection, that in coming to that station many people daily crossed the tracks of the railroad at grade at the public way. He further offered to show that it was the universal practice to walk between the tracks where the assured was killed. The judge excluded this evidence; and the plaintiff excepted.

At the request of the defendant, the judge ruled that the action could not be maintained, and directed a verdict for the defendant; and, at the request of the plaintiff, reported the case for the determination of this court. If the ruling was right, the verdict was to stand; otherwise, a new trial was to be granted.

J. Lowell, Jr., (*H. H. Darling* with him,) for the plaintiff.

E. Avery & A. E. Avery, for the defendant.

FIELD, C. J. The policy or certificate issued by the defendant was upon certain express conditions, one of which contained the following clause: "Entering or attempting to enter or leave any public conveyance using steam as a motive power while the same is in motion, or walking or being on the road bed or bridge of any steam railway, are hazards not contemplated or covered by this certificate." On the undisputed facts of this case we think that the plaintiff's husband when he was killed was walking on the road-bed of the New York and New England Railroad Company within the meaning of this clause. We have no occasion to consider whether crossing the road-bed of a railroad when travelling along a public way, or along a private way which a person has a right to use, is "walking or being on the road-bed" within the meaning of the certificate. According to the report, it must be taken as conceded that the plaintiff's husband was walking longitudinally on the road-bed between the tracks of the railroad for the purpose of reaching the station. There was a public way across the railroad, and a walk parallel with the tracks extending from this way to the station, which he could have used. The place where he was walking was not fitted up as a way; it was a part of the road-bed, and nothing

more. That many people used it as the plaintiff's husband did is immaterial in a suit against this association.

In accordance with the terms of the report, the

Verdict is to stand.

PAULINE W. BURKHARDT vs. ALEXANDER R. YATES
& others.

Suffolk. March 7, 1894. — June 22, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Lease — Partnership — Deed Poll.

An indenture of lease purported to be between the plaintiff as lessor, and four defendants, copartners, as lessees. It was signed and sealed by the plaintiff and by two of the defendants. The other two defendants, being out of the country at the time of the execution of the indenture, did not sign it, although two spaces were left for their signatures with seals affixed, it being apparently the intention that all the defendants should sign and seal the indenture. One copy of it thus executed was delivered by the plaintiff for all the lessees to the two defendants who had signed it, and they delivered the other copy to the plaintiff. The firm entered and occupied the premises for five months, and then gave notice that they should quit and deliver them up. *Held*, that though an action could not be maintained on the covenants of the lease against the four defendants because they did not execute it, yet the indenture took effect as a deed poll, and a promise would be implied on the part of the defendants to pay rent according to its stipulations.

CONTRACT, for the recovery of rent due under a written lease. Writ dated October 18, 1892.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

The plaintiff, being on June 1, 1891, the owner of a leasehold estate terminating December 31, 1893, caused a form of lease of the remainder of her term to be prepared, which, at the beginning thereof, recited that it was between the plaintiff, as lessor, and William A. Yates, of Vassalborough, Alexander L. Yates, of Waterville, both in the county of Kennebec and State of Maine, Sidney S. Shattuck, of Malden in the county of Middlesex, and George A. Drysdale, of Chelsea in the county of

Suffolk, both in the Commonwealth of Massachusetts, doing business under the firm name and style of Yates Bros., Shattuck, & Co., as lessees. This form of lease in duplicate original was signed and sealed by the plaintiff, and by the defendants Shattuck and Drysdale. The other two defendants, Yates, being out of the country at the time of the execution of the indenture, did not sign it, although two spaces were left for their signatures with seals affixed. One copy of the indenture thus executed was delivered by the plaintiff for all the lessees to the two who had signed it, and they delivered the other copy to her, and the firm entered upon and occupied the premises. The firm paid rent for one month, and occupied for five months, and then gave notice that they should quit and deliver up the premises, which thereafter remained vacant from October 31, 1891, until April 1, 1892, when they were again rented by the plaintiff to another tenant.

J. H. Morison, for the defendants.

W. C. Cogswell, for the plaintiff.

FIELD, C. J. The indenture of lease purports to be between the plaintiff, as lessor, and the four defendants, "doing business under the firm name and style of Yates Bros., Shattuck & Co.," as lessees. It was signed and sealed by the plaintiff and by two of the defendants. The other two defendants, being out of the country at the time of the execution of the indenture, did not sign it, although two spaces were left for their signatures, with seals affixed. It apparently was the intention that all the defendants should sign and seal the indenture. One copy of this indenture thus executed was delivered by the plaintiff to the two of the defendants who had signed it, and they delivered the other copy to the plaintiff. The agreed facts show that the indenture was delivered to the two defendants for all the lessees, and that the firm entered upon and occupied the premises. The firm paid rent for one month, and occupied for five months, and then gave notice that they should quit and deliver up the premises.

An action could not be maintained on the covenants of the lease against the four defendants, because they did not execute it. It is argued that an action could not be maintained on the covenants of the lease against the two defendants who executed

it, because it is said to be apparent that it was intended that all four of the defendants should execute it, and it does not purport to be a lease to two of the defendants. But the defendants could have accepted the demise on the terms and conditions contained in the indenture without executing the indenture. In such a case the indenture would take effect as a deed poll, and a promise would be implied on the part of the defendants to perform the stipulations expressed in the indenture on their part to be performed. We think that the meaning of the agreed statement of facts is, that the defendants as a firm or partnership accepted this lease, and occupied the premises under it; and therefore the members of the firm became bound to pay rent according to the stipulations of the lease until the surrender of the term was accepted by the plaintiff. *Codman v. Hall*, 9 Allen, 335. *Kabley v. Worcester Gas Light Co.* 102 Mass. 392. *Clark v. Gordon*, 121 Mass. 330. *Worster v. Great Falls Manuf. Co.* 41 N. H. 16. *McFarlane v. Williams*, 107 Ill. 33. *Libbey v. Staples*, 39 Maine, 166. *Judgment affirmed.*

SAMANTHA M. BURLINGAME vs. ROBERT A. BARTLETT
& others.

Hampden. May 18, 1894. — June 22, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Equity — Appeal — Statute — Entry Fee.

The plaintiff filed a bill in equity in the Superior Court, to which the defendant demurred, and on November 9, 1893, the demurrer was sustained, and the bill dismissed with costs, and the plaintiff appealed; all of which appeared in the docket entries of the Superior Court. The plaintiff did not enter the appeal in the Supreme Judicial Court, whereupon, on April 2, 1894, the defendant applied to the Superior Court for an execution for costs. The plaintiff thereupon filed his petition in the Supreme Judicial Court for leave to enter his appeal under Pub. Sts. c. 150, § 17. *Held*, that, although appeals in equity must, under Pub. Sts. c. 151, § 13, be taken within thirty days after the decree, there is no provision that such appeals must be entered in the Supreme Judicial Court within the thirty days; that in the present case there must be some formal act of entry of the appeal on the docket of the Supreme Judicial Court to entitle the plain-

tiff to prosecute his appeal in that court; and that under the circumstances he should be permitted to enter his appeal on the docket of the Supreme Judicial Court.

The entry of an appeal in the Supreme Judicial Court from a final decree entered in the Superior Court dismissing a suit in equity, is the entry of a suit within the meaning of St. 1891, c. 87, § 1, and a party may enter his appeal on procuring the proper papers and paying to the clerk an entry fee of three dollars, as required by the statute.

FIELD, C. J. The plaintiff filed a bill in equity in the Superior Court for the County of Hampden, to which the defendants demurred; the bill was afterwards amended, and the defendants demurred to the bill as amended, and on November 9, 1893, the demurrer was sustained, and the bill as amended was dismissed with costs, and on the same day the plaintiff appealed; all of which appears in the docket entries of the Superior Court. The plaintiff did not enter this appeal in the Supreme Judicial Court, whereupon, on April 2, 1894, the defendants made application to the Superior Court for an execution for costs. The plaintiff thereupon filed her petition in the Supreme Judicial Court for leave to enter her appeal under Pub. Sts. c. 150, § 17.

Pub. Sts. c. 150, §§ 9, 16, 17, certainly imply that appeals or exceptions shall be entered in the Supreme Judicial Court, but it is argued that these sections relate only to appeals and exceptions in actions at law. See Pub. Sts. c. 152, §§ 10, 12, 16. Section 16 of Pub. Sts. c. 150, was amended by St. 1888, c. 94.

Appeals from a final decree in equity are regulated by Pub. Sts. c. 151, § 13, and this section was made to apply to appeals from final decrees in equity in the Superior Court after that court was given jurisdiction in equity. St. 1883, c. 223, § 2. Section 15 of Pub. Sts. c. 153, is as follows: "Copies and papers relating to a question of law arising in either court upon appeal, by bill of exception, reserved case, or otherwise, shall be prepared by the clerk of the court, and shall thereupon be transmitted to and entered in the law docket of the Supreme Judicial Court for the proper county as soon as may be after such question of law is reserved and duly made a matter of record in the court where the action is pending; but the entry thereof shall not transfer the case, but only the question to be determined."

A distinction between appeals in equity, and appeals and exceptions in actions at law, under St. 1888, c. 94, was taken in

Gray v. Gray, 150 Mass. 56, and *Ingalls v. Ingalls*, 150 Mass. 57. Appeals in equity must be claimed within thirty days after the entry of the decree, and such a claim must be entered on the clerk's docket, which must mean the clerk's docket where the appeal is claimed; Pub. Sts. c. 151, § 13; and it is provided in this section that "thereupon all proceedings under such decree shall be stayed, and such appeal shall thereupon be pending before the full court, who shall hear and determine the same, and affirm, reverse, or modify the decree appealed from, as circumstances may require. On the reversal of a final decree, the court may remand the cause, with such directions as are necessary and proper, to a single justice, further to proceed therein, or may refer it to a master, or take such other order respecting future proceedings therein as equity requires, and as shall be most conducive to the just and speedy determination of the case." Section 14 of the same chapter is as follows: "The clerk of the court for the Commonwealth shall enter appeals in equity and probate matters on a separate docket." See §§ 15, 16; Pub. Sts. c. 154, § 39; c. 156, §§ 7-10; c. 159, §§ 3, 4.

In the removal of a suit from one court to another an entry of the papers is generally required in the court to which the suit is removed. Pub. Sts. c. 152, § 7; c. 154, §§ 40, 41; c. 161, § 12; c. 178, § 46. See St. 1883, c. 223, § 8. From the nature of an appeal from one court to another, whether the appeal carries the whole case to the appellate court or only certain questions in the case, we think that there must be something in the nature of an entry of the case, or of the questions, in the appellate court. In the present case the Supreme Judicial Court for the County of Hampden could not know that an appeal had been taken unless there was an entry on the docket of that court, and an entry on the docket of the Superior Court that an appeal was claimed was not equivalent to an entry on the docket of the Supreme Judicial Court. The need of such an entry on the clerk's docket of the Supreme Judicial Court for the Commonwealth, when the appeal is to that court, is apparent. Pub. Sts. c. 150, § 30; c. 153, § 16.

Although appeals in equity must be taken within thirty days after the decree, there is no provision that such appeals must be entered in the Supreme Judicial Court within the thirty days.

The only statutory provision on this subject is Pub. Sta. c. 153, § 15, and we think that this section must be held to apply to appeals and exceptions in equity as well as in actions at law. The papers are to be "transmitted to and entered in the law docket of the Supreme Judicial Court for the proper county as soon as may be after such question of law is reserved and duly made a matter of record in the court where the action is pending." The statutes from which this section was taken have been construed in *Priest v. Groton*, 103 Mass. 530, and *Bentley v. Ward*, 116 Mass. 333.

We are of opinion that, when an appeal is taken in equity from a decree of the Superior Court, there must be some formal act of entry of the appeal on the docket of the Supreme Judicial Court in order to entitle the plaintiff to prosecute her appeal in that court, that in the present case this was not done through a misapprehension of the law, and that the plaintiff should now be permitted to enter her appeal on the docket of the Supreme Judicial Court for the County of Hampden.

The remaining question is whether she should be required to pay an entry fee of three dollars. The practice in the different counties has not been uniform. The practice in the Supreme Judicial Court for the Commonwealth has been that an entry fee of one dollar and a half has been exacted upon the entry of all appeals or exceptions at law or in equity. Pub. Sta. c. 159, §§ 3, 4. The fees of clerks of courts under Pub. Sta. c. 199, § 4, were, "For the entry of an action, complaint, or petition in a civil suit or proceeding in court, one dollar," etc. St. 1888, c. 257, provided that clerks of courts should receive salaries which should be in full compensation for all their services, and the third section provided that "there shall be paid to the clerk upon the entry of every suit in the Supreme Judicial and Superior Courts . . . the sum of three dollars," etc. See St. 1890, c. 360. These statutes were repealed by St. 1891, c. 87, which is now in force. The first section of this statute provides: "There shall be paid to the clerk upon the entry of every suit, action, libel for divorce, or petition in the Supreme Judicial and Superior Courts . . . the sum of three dollars, . . . and no suit, action, libel for divorce, or petition shall be entered or filed by the clerk until said fee is paid." The question is whether

the entry of an appeal in the Supreme Judicial Court from a final decree entered in the Superior Court dismissing a suit in equity, is the entry of a suit within the meaning of this statute. The language of all the statutes on the subject is by no means plain, but in view of the practice heretofore generally prevailing the court are of opinion that it should be regarded as the entry of a suit. The result is, that the plaintiff has leave to enter her appeal on procuring the proper papers and paying to the clerk an entry fee of three dollars. *So ordered.*

J. Bliss, for the defendants.

E. H. Lathrop, for the plaintiff.

LUTHER E. WIGGIN vs. CONSOLIDATED ADJUSTABLE SHOE COMPANY.

Essex. January 11, 12, 1894. — June 23, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

*Contract — Agreement for Exclusive Right of Sale within given Territory —
Guaranty — Protection from Infringement.*

The defendant, who was a shoe manufacturer and the owner of a patented invention relating to boots and shoes, appointed the plaintiff his sole agent within a prescribed territory for the sale of shoes manufactured by him, and agreed that the plaintiff should have the "sole and exclusive sale of said shoes in said territory," and that the defendant would protect him from all infringements and infringement suits on account of said shoes. *Held*, that the defendant, in substance, agreed that no one else should have the right from him to sell his shoes in the prescribed territory, and that he would not sell shoes there himself, but that he did not guarantee the plaintiff against the sale there of such shoes, obtained elsewhere, by other persons over whom the defendant had no control, and that he meant that he would protect the plaintiff only from suits against him involving the validity of the patents contained in the shoes, and against any party infringing the patent.

CONTRACT. Trial in the Superior Court, before *Hopkins, J.*, who ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

R. Lund, for the plaintiff.

H. F. Hurlburt, for the defendant.

MORTON, J. This is an action for the breach by the defendant of a written contract between it and the plaintiff. At the date of the contract the defendant was the owner of a patented invention relating to boots and shoes, and was the sole manufacturer of boots and shoes containing the invention, and was seeking to introduce them into new territory. For that purpose it made the contract with the plaintiff. We infer that it made similar contracts with other parties for a like purpose. Under the contract with the plaintiff, it appointed him "its sole agent for the sale of shoes manufactured by it . . . in the cities of Minneapolis and St. Paul, and the counties of Hennepin, Ramsey, Washington, and Anoka," Minnesota, and agreed that he should have "the sole and exclusive sale of said shoes in said territory." It also agreed that it would protect him "from all infringements and infringement suits on account of said shoes." The contract was dated January, 1889, and was to run five years. In October, 1889, another person began to offer for sale in Minneapolis the same kind of shoes which the plaintiff was selling, and which the defendant manufactured. He offered them at a price less than that at which the plaintiff was selling. The plaintiff notified the defendant, and called upon it to stop the interference. The defendant made efforts to find out where the shoes that were thus offered for sale were obtained, and it finally appeared that they had been bought in Chicago and taken to Minneapolis, but had not been sold by any agent of the defendant to the party offering them for sale in Minneapolis. The defendant did what it could, by remonstrance and by circulars cautioning the public against purchasing any shoes not sold by the plaintiff, to protect him, but instituted no suit or proceedings against the party. The plaintiff contends that the defendant is liable under the clauses in the contract already referred to. We do not think it is. The defendant appointed the plaintiff its sole agent for the territory described, and agreed in effect, as we construe the contract, that he, so far as it was concerned, should have the exclusive sale of said boots and shoes in said territory. It did not warrant nor guarantee him against any sale there by anybody else of its shoes. It agreed in substance that nobody else should have the right from it to sell its shoes there, and that it would not sell shoes there

itself; and it is not claimed that the defendant authorized or made the sale of which the plaintiff complains. Generally such a contract would give the party selected a monopoly within the territory described, though unaccompanied with any restrictions on the place of re-sale; especially when applied to articles like boots and shoes. But the contract especially provides that the plaintiff is to have "the right to make all sales or fill any orders that shall come to him in his regular place of business in said territory, but not in any other place, and . . . shall not solicit orders or canvass for trade outside of said territory." It cannot fairly be supposed that this right was confined to the plaintiff alone. The contract upon its face, therefore, impliedly gave him notice that the defendant did not undertake to warrant or guarantee him against the presence of goods bought from an agent or party elsewhere. No doubt the defendant could have guaranteed the plaintiff against any sale by any one else within this territory, and could have restricted its licenses so that no boots or shoes could be sold in such a manner as to interfere with the sale of other licensees. *Hobbie v. Jennison*, 149 U. S. 355. But it has not done so.

The agreement that the defendant "shall protect" the plaintiff "from all infringements and infringement suits on account of said shoes," means obviously that, if anybody sues the plaintiff, or makes a claim against him on the ground that the patent contained in said shoes infringes upon another patent, or if anybody else undertakes to sell shoes within the plaintiff's territory that infringe upon the defendant's patent, then the defendant will protect the plaintiff against such suit or claim, and will vindicate its patent.

We think the rulings of the presiding justice were correct, and that the exceptions must be overruled, and it is so ordered.

Exceptions overruled.

INDEX.

ABANDONMENT.

See EVIDENCE, 22; HOMESTEAD, 8.

ABATEMENT.

Under Pub. Sts. c. 152, § 10, and c. 153, § 8, the decision of a justice of the Superior Court upon a question raised by an answer in abatement is final. *Heavor v. Page*, 109.

See TRUSTEE PROCESS, 1.

ABUSE OF LEGAL PROCESS.

1. At the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, in the instructions, not excepted to, as to the defendant's personal conduct, malice was defined as acting in bad faith, and the jury were told that if the defendant, with the design to injure or oppress, by fixing an excessive *ad damnum*, went beyond what he believed to be necessary to secure the payment of the judgment which he might recover, by forcing payment of a sum larger than would otherwise be paid, he was not acting in good faith, and that that would warrant an inference that he was acting maliciously, and in the instruction excepted to they were told to apply the same test to the conduct of the attorney, and the substance of the instruction was that the defendant was as responsible for such malice on the part of his attorney as for his own. *Held*, that under the circumstances the instruction did not harm the defendant. *Zinn v. Rice*, 571.
2. At the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, evidence was admitted, subject to the defendant's exception, of inquiries about the attachment made of the plaintiff by mercantile agency reporters and by people who sold him goods, of conversations of neighbors with his superintendent and inquiries by them and by the employees as to what the attachment meant, of the fact that a creditor attempted to

collect through a lawyer a debt of which payment had been remitted to the creditor on the day it was due, of a copy of a mercantile paper containing a notice of the attachment with evidence of the circulation of that paper, and also of the reports of commercial and trade agencies as to the attachment. *Held*, that all the circumstances which the evidence tended to show were natural results of the defendant's act in making the excessive attachment, and tended to prove damage resulting in an injury to his business, and that, as none of the acts were wrongful acts of third persons, it was not necessary to consider what difference it would have made if the acts shown as tending to prove loss of credit or injury to trade had been wrongful acts of others. *Held, also*, that if the mercantile paper and the agency reports had been inadmissible for any purpose, the fair construction of that part of the charge which forbade the jury to allow damages for any acts giving currency to the fact that an excessive attachment had been made if such acts were not authorized by the defendant, as no request for a specific withdrawal of the evidence was made, is that the evidence was itself understood to have been withdrawn from their consideration. *Zinn v. Rice*, 571.

See EVIDENCE, 6, 20.

ACCEPTANCE.

See GUARANTY, 2-4.

ACCIDENT INSURANCE.

1. In an action upon a policy of insurance against bodily injuries effected "through external, violent, and accidental means," containing provisos that no claim shall be valid thereunder "when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," and that the assured "is required to use all due diligence for personal safety and protection," the burden of proof is on the defendant to show that the assured did thus expose himself to such danger, or did not use such due diligence. *Keene v. New England Mutual Accident Association*, 149.
2. A policy of insurance was issued against bodily injuries effected "through external, violent, and accidental means," containing provisos that no claim should be valid thereunder "when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," and that the assured "is required to use all due diligence for personal safety and protection." The assured was killed by being struck by a detached railroad car, which had been kicked there by an engine, and the sight of which was cut off by his umbrella, while crossing the railroad tracks at a point where from one thousand to two thousand persons a day had been in the habit of crossing for years unopposed, although notices had been posted up by the railroad corporation to prohibit it. *Held*, in an action on the policy, that the act of the assured was not necessarily to be

deemed a violation of the provisions of the policy; and that the plaintiff was entitled to go to the jury. *Keene v. New England Mutual Accident Association*, 149.

3. Where the assured is killed while walking on the road-bed between the tracks of a railroad, when parallel to it is a sidewalk which he could have used, he is within that clause of the policy or certificate of the insurance company providing that "walking or being on the road-bed or bridge of any steam railway are hazards not contemplated or covered by this certificate," and the fact that many other people used the road-bed in the same manner is immaterial in an action against the insurance company upon the policy. *Piper v. Mercantile Mutual Accident Association*, 589.

ACCOUNT.

See ESTATES OF PERSONS DECEASED.

ACQUIESCENCE.

See BENEFICIARY ASSOCIATION, 4.

ACTION.

1. If a memorandum in writing is declared on as a written contract of sale, the vendee cannot maintain an action for its breach if he has not himself complied with its terms. *King v. Faist*, 449.
2. Proof that a written memorandum of an oral bargain does not correctly state the terms of the oral bargain will defeat an action in which the memorandum is declared on as a written contract. *Ibid.*
3. No action lies upon a written contract made and delivered as a contract superseding a previous oral bargain, if the written contract has been itself superseded by the substitution of a different contract. *Ibid.*
4. A constable who, for the purpose of serving a civil process, enters upon premises which he supposes are occupied by the person whom he is seeking, but which are occupied by another, who does not induce him to enter, is a trespasser if the person whom he seeks is not in fact there, and cannot maintain an action against the owner of the premises for personal injuries occasioned by a defect therein. *Blatt v. McBarron*, 21.
5. The plaintiff, who was serving out a sentence at hard labor in the house of correction, duly imposed upon him for a crime of which he had been convicted, was injured by having his hand caught in a planing machine, and thereupon brought an action against the superintendent or instructor in the room in which he was set to work, against the master of the house of correction by whom the superintendent was appointed, and against the general superintendent of prisons for the Commonwealth, all of whom were public officers performing public services prescribed by statute. *Held*, that the action could not be maintained. *O'Hare v. Jones*, 391.
6. Commissioners to make preliminary plans for the erection of a new courthouse for the county of Suffolk were appointed by the mayor of the city

of Boston, under the authority of an order of the city council approved March 4, 1885, which provided that the commissioners should "incur no liability for or in behalf of the city unless specially authorized so to do by the city council." The St. 1885, c. 377, as amended by St. 1886, c. 122, authorized the same commissioners to proceed with the erection of such court-house, and they, acting under the authority so conferred, made a contract in writing with the plaintiffs for the laying of the brickwork and masonry of a portion or section of such structure. Subsequently, the commissioners, acting on behalf of the city of Boston, but, so far as appeared, without the authority of the city council, with a view to hastening the work and to making uniform progress in the construction of the different sections of the structure upon which contractors other than the plaintiffs might be employed, entered into an agreement with the plaintiffs, whereby, in consideration of their abandoning the derricks which they had provided, and of their using in place thereof the "Norcross derricks," so called, the city should at its own expense construct the Norcross derricks, under the direction of the commissioners, and be responsible for their safe construction and erection, and should hold the plaintiffs harmless against any loss or damage which they might suffer by reason of any defect in the construction or any negligence in the erection of the derricks so long as the city should continue to own them. The Norcross derricks were afterwards erected by the city, and while in use by the plaintiffs pursuant to the agreement, and while they remained the property of the city, by reason of their improper construction and erection, fell and injured a workman employed by the plaintiffs. The workman subsequently recovered judgment against the plaintiffs for damages, which they were compelled to pay, and thereupon they brought an action on the agreement against the city of Boston to recover back the sum so paid by them. *Held*, that the action could not be maintained. *Sampson v. Boston*, 288.

7. In an action for personal injuries the evidence entirely failed to disclose how the accident happened, or what caused it; the plaintiff's intestate, when asked how it happened, said that he did not know, and the cause and manner of the accident were wholly matters of conjecture. There was nothing to show any defect in ways, works, or machinery of the defendant to which it might be inferred the accident was due, nor any negligence on the part of the conductor or of any one else in charge of the train or engine. *Held*, that the action could not be maintained. *Felt v. Boston & Maine Railroad*, 311.

See ARREST, 1, 2; ASSIGNMENT, 1; COMPOSITION WITH CREDITORS, 2; DOG, 2; EXECUTION; FIRES; FORCIBLE ENTRY AND DETAINER; FOREIGN LAWS, 6; FRAUDULENT REPRESENTATIONS, 6; LEASE, 3; MASTER AND SERVANT, 3-5, 7-10, 13; MORTGAGE, 1; NEGLIGENCE, 2, 8; PASSENGER, 2, 3; TROVER, 2.

ADMINISTRATOR.

See DEVISE AND LEGACY, 4; LIMITATIONS, STATUTE OF, 2; TROVER, 2.

ADMIRALTY.

See MASTER AND SERVANT, 11.

ADMISSIONS.

See AUDITA QUERELA, 1; EVIDENCE, 23; WITNESS, 2.

ADVERSE POSSESSION.

The St. of 1861, c. 100, entitled "An Act defining the rights of owners or occupants of land adjoining railroads," applies only to the location of the railroad corporation, and not to land acquired by purchase adjoining the location. *Maney v. Providence & Worcester Railroad*, 283.

See EVIDENCE, 23; LIMITATIONS, STATUTE OF, 1; WRIT OF ENTRY, 1.

AGENT.

See PRINCIPAL AND AGENT.

AGREED FACTS.

See CASE STATED; CONFLICT OF LAWS; LIMITATIONS, STATUTE OF, 3.

ALIMONY.

See FOREIGN LAWS, 3.

AMENDMENT.

See CONTRACT, 6; EXCEPTIONS, 1, 2; EXECUTION; JUDGMENT;
MECHANIC'S LIEN, 2; VERDICT, 2.

ANSWER.

See AUDITA QUERELA; FRAUDS, STATUTE OF, 3; TRUSTEE PROCESS, 1.

APPEAL.

1. An appeal from the decree of a single justice brings up merely the record of the case, and parties cannot, at least without the sanction of the single justice, add to or diminish the record; and the question before the court, on such an appeal, is whether the decree is justified by the record. *Commonwealth v. Suffolk Trust Co.* 550.
2. The plaintiff filed a bill in equity in the Superior Court, to which the defendant demurred, and on November 9, 1893, the demurrer was sustained, and the bill dismissed with costs, and the plaintiff appealed; all of

which appeared in the docket entries of the Superior Court. The plaintiff did not enter the appeal in the Supreme Judicial Court, whereupon, on April 2, 1894, the defendant applied to the Superior Court for an execution for costs. The plaintiff thereupon filed his petition in the Supreme Judicial Court for leave to enter his appeal under Pub. Sts. c. 150, § 17. *Held*, that, although appeals in equity must, under Pub. Sts. c. 151, § 13, be taken within thirty days after the decree, there is no provision that such appeals must be entered in the Supreme Judicial Court within the thirty days; that in the present case there must be some formal act of entry of the appeal on the docket of the Supreme Judicial Court to entitle the plaintiff to prosecute his appeal in that court; and that under the circumstances he should be permitted to enter his appeal on the docket of the Supreme Judicial Court. *Burlingame v. Bartlett*, 593.

3. The entry of an appeal in the Supreme Judicial Court from a final decree entered in the Superior Court dismissing a suit in equity, is the entry of a suit within the meaning of St. 1891, c. 87, § 1, and a party may enter his appeal on procuring the proper papers and paying to the clerk an entry fee of three dollars, as required by the statute. *Ibid*.

See ASSESSOR, 1; CASE STATED, 2; COMPLAINT; EQUITY, 9-11; HABEAS CORPUS, 2; SUPERIOR COURT, 1.

APPEARANCE.

See GRADE CROSSING, 5.

ARREST.

1. A person who was arrested upon a defective writ was taken by the officer, at his own request, to the office of a lawyer with whom he consulted, and then to the residence of one magistrate for the purpose of giving bail, and to the residence of another magistrate, where he gave bail, and he also paid for drafting the bail bond and for half of the carriage hire. When the writ was entered he appeared, filed an answer making no objection to the service, placed the case upon the trial list, and consented to dispose of it by an entry of "Neither party." *Held*, in an action against the officer for false arrest, that the above facts would not justify a finding that the plaintiff waived the illegal arrest, or had estopped himself from maintaining an action for damages. *Buzzell v. Emerton*, 176.
2. An arrest upon a writ which contains no *capias* clause is illegal; and the officer in making the arrest is a trespasser, and is liable in damages to the arrested person. *Ibid*.
3. In an action against an officer for false arrest, it appeared that the plaintiff, by agreement with the officer, was taken on the evening of his arrest to the residence of a magistrate, where he gave bail and was discharged. A bill of exceptions alleged at the trial did not show that the defendant asked for instructions as to the measure of the damages which the plaintiff might recover; nor that any instruction upon that subject was given,

except the general one that the plaintiff was "entitled to recover damages which he sustained in consequence of what the defendant wrongfully did." *Held*, that there was no error in this instruction; and that it was not open for the defendant to complain that no specific instruction was given upon the question whether the plaintiff could recover damages for what occurred between the time when he agreed to give bail and his actual discharge. *Buzzell v. Emerton*, 178.

See POOR DEBTOR.

ASSESSOR.

1. A motion to recommit a report to an assessor is addressed to the discretion of the court, and a decision thereon is not a subject of appeal to this court. *Carew v. Stubbs*, 294.
2. If a party desires the findings of an assessor to be reviewed by the Superior Court he should take specific exceptions to the assessor's findings, and request so much of the evidence to be reported as bears upon the points covered by the exceptions; and any questions of law raised thereon can be brought to this court. *Ibid*.

ASSIGNEE IN INSOLVENCY.

See EQUITY, 4.

ASSIGNMENT.

1. The delivery of an insurance policy for a valuable consideration, with the intent to vest the title in the assignee, operates as a valid transfer, and the equitable interest thus acquired by the assignee will be protected and enforced in courts of law. *Hewins v. Baker*, 320.
2. A failure to obtain the consent of an insurance company to an assignment of a policy, as required by its terms, may defeat the policy, but does not render invalid the transfer; and it seems that an issuance of a paid up policy by the company in place of the original policy after an assignment of the latter without its consent, is a waiver of that requirement. *Ibid*.
3. On the question whether M., the maker of certain promissory notes, delivered to B., the holder of them, certain policies of insurance as collateral security for his notes, B. testified that "he [M.] said he would assign them to me; . . . he put them all in my box; . . . he said they were collateral security for all those notes; he said he assigned these policies to me for security for those notes; he told me they were all mine; he said they were mine just as much as if I had the money; . . . he told me that the writing was to show that those policies belonged to me, and when his estate was settled, or if I should die suddenly, it would be all right, because I saw him put them in the box; . . . he said those policies of insurance were mine; that he had assigned them to me and that he gave them to me." B. further testified that he saw M. put the policies

in his box, which, though kept in M.'s safe, had a tag on it bearing the words "Property of B., Boston, Mass."; and that subsequently the box with its contents and the key which had been kept by M. were left with B. for examination, and thenceforth remained in his possession. *Held*, that upon this evidence a finding was warranted that the policies were delivered to B. by M. as collateral security for his notes. *Hewins v. Baker*, 320.

4. The stockholders of a corporation which had become unable to obtain money to carry on its business voted that proceedings be instituted for the appointment of a receiver to take charge of its assets and to close up its affairs. The capital stock was divided into five hundred shares, of which A. owned two hundred and fifty, B. two hundred and twenty-five, and other persons the remaining twenty-five. The vote was passed by stockholders representing four hundred and seventy-five shares, of whom B. was one, and the same stockholders united in a request in writing for the appointment of receivers. Thereupon, upon the petition of a creditor of the corporation and of B., receivers were appointed, who, after having discharged in full all the obligations of the corporation to its creditors, had remaining in their hands a considerable amount of money for distribution among the stockholders. When the receivers were appointed, B. was himself indebted to the corporation to an amount far exceeding the amount which finally remained in the hands of the receivers for distribution. Subsequently to the appointment of receivers, B. made a general assignment to trustees for his creditors, to whom his indebtedness exceeded the assets of his estate. The receivers of the corporation, in accordance with an order of court, assented to B.'s assignment, and became parties thereto, and filed with the trustees a proof of the claim of the corporation against him, to which was annexed a statement that it was "without waiving any rights in law or equity which we may have by way of set-off or otherwise on account of dividend or dividends or payments from funds in our hands upon stock of the Cape Ann Granite Company standing in the name of B. at the time we were appointed receivers of said Cape Ann Granite Company." The assignment executed by B. contained a clause providing that the creditors who should assent and sign should thereby accept and take in payment of their respective debts the dividend payable under the assignment, and that they severally discharged B. from all such demands. The order under which the receivers became parties to the assignment was entered upon their petition, in which it was recited that it was necessary for the corporation to become a party in order to share in the dividends, and that it was for the interest of the corporation so to do, and the decree in terms allowed the receivers to become parties to the assignment, and thereby compound the liability of B. to the corporation, and to accept the dividends paid under the assignment in full discharge of that liability. *Held*, that, as the corporation was not dissolved, but continued as an existing corporation, and the certificate of stock owned by B. being held by his trustees, who had paid no dividend under the assignment, the creditors of B. had under the assignment no equity superior to that which he had when he made the

assignment, and that the stockholders of the corporation other than B. and his trustees had an equity superior to that of B. to the fund in the hands of the receivers, and that a set-off against the claim of his trustees to a distributive share of the funds in the hands of the receivers should be allowed. *Merrill v. Cape Ann Granite Co.* 212.

See BENEFICIARY ASSOCIATION, 3, 4; DEVISE AND LEGACY, 2; EQUITY, 12; MORTGAGE, 2, 3, 5, 6; PRINCIPAL AND AGENT; RECEIVER, 4; SPECIFIC PERFORMANCE, 1.

ATTACHMENT.

See ABUSE OF LEGAL PROCESS; FOREIGN CORPORATION, 1, 4;
RECEIVER, 1, 2; REVIEW.

ATTORNEY AND CLIENT.

See ABUSE OF LEGAL PROCESS, 1; EVIDENCE, 7; PROBATE COURT.

AUCTION.

See MORTGAGE, 1.

AUDITA QUERELA.

1. On June 11, 1878, an action was brought by A. on a promissory note for \$1,000, signed by B. and indorsed by C., and the *ad damnum* in the writ was laid at \$300. The action was entered in July, 1878, and on July 20 judgment was entered thereon by default for \$300. On July 12, 1879, on motion, the judgment was vacated, the action brought forward, the *ad damnum* was increased to \$1,500, and a new judgment entered in favor of A. for \$1,116.73 damages. Execution issued, and a small amount was paid thereon. On October 27, 1879, A. assigned to C., the indorser, the judgment and execution obtained in July, 1879, and on March 21, 1888, an action was brought on the judgment in the name of A. "for the benefit of" C., assignee. This action was defended by B., who set up various equitable defences as against C., but made no mention of the increase of the *ad damnum*. At the trial it was adjudged that the answer set forth no defence, and a verdict was ordered for the plaintiff, and on May 20, 1889, judgment was entered in his favor for \$1,796.13 damages, which was paid by B. On June 6, 1889, B. sued out of this court a writ of error, on which the judgment entered against him on July 12, 1879, was reversed, for the reason that the judgment entered in July, 1878, could not be vacated on a mere motion, and this left the judgment of July, 1878, in force. On September 24, 1891, B. sued out a writ of *audita querela* to set aside the judgment for \$1,796.13 obtained on May 20, 1889, and to recover damages. After the action was brought A. died, and his executor was allowed to appear and defend. At the trial the presiding

justice found that at some time in June, 1878, and before the entry of the first action, C. paid to A. the amount then due upon the note, and that all the subsequent proceedings set forth in the declaration were begun and carried on by C. for his benefit in the name of A., and without consultation with him, and that the fact that such proceedings were so begun and carried on was known to B. during the pendency of the suit upon the judgment. *Held*, that as against A., who had nothing to do with the prosecution of the action on the judgment which was brought in his name for the benefit of C., and who had received nothing from the judgment, the writ of *audita querela* would not lie. *Held, also*, that the pleadings in the action upon the judgment which were offered for the purpose of proving that the issues in this case were involved in that one were admissible for the purpose for which they were offered. *Held, also*, that the answer in the action on the judgment, which was also offered independently to prove certain facts, and which was signed by B. personally, was competent, as containing deliberate admissions made by him. *Radclyffe v. Barton*, 327.

2. A writ of *audita querela* will be of no avail where the party complaining has already had an opportunity for defence. *Ibid*.

AUDITOR.

See GRADE CROSSING, 6.

BAIL.

See ARREST, 1, 3.

BAILMENT.

See RAILROAD, 4.

BANK.

See BENEFICIARY ASSOCIATION, 3, 4; PROMISSORY NOTE, 2, 3;
SAVINGS BANK.

BANKRUPTCY.

See FRAUDS, STATUTE OF, 4-6.

BENEFICIARY ASSOCIATION.

1. By a decree of the Superior Court a receiver was appointed for a society purporting to be organized under the provisions of chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, having its location in the city of Manchester in that State, and its principal place of business in the city of Boston in this Commonwealth, the object of whose

incorporation was to institute lodges throughout the State of New Hampshire and other States and Territories for friendly co-operation and moral and social improvement; to collect and accumulate a fund from which any person holding a certificate of the corporation might be entitled to receive a sum not exceeding \$100, according to the terms and conditions of the certificate; to buy, sell, hold, improve, and lease real estate, personal property, and other property necessary or incident to the conduct of such business, and to carry on the business of general brokers in stocks, securities, shares, certificates, bonds, and choses in action, and in buying and selling the same. The receiver was authorized to take possession of the property and effects of the corporation, to collect all debts due to it, and to distribute the funds among its creditors under the direction of the court. The corporation was directed to deliver to the receiver all assets and property of any kind or nature belonging to the corporation within this Commonwealth, and to execute and deliver to him conveyances and assignments of all its assets and property not within this Commonwealth. Notice was ordered to be sent to all claimants and certificate holders whose names appeared upon the books of the corporation and who were in good standing, and to be published in certain newspapers, to all claimants and certificate holders to appear and present their claims, at a time and place named, before the receiver, who was authorized to hear and pass upon them. *Held*, that it was evident from the proceedings of the court, that it intended that the receiver should collect and receive property of the corporation found outside of the Commonwealth, as well as within it, and that holders of certificates resident in other States than this Commonwealth should present and prove their claims before the receiver. *Garham v. Mutual Aid Society*, 357.

2. A decree of the Superior Court entered upon the report of the receiver of a corporation purporting to be organized under chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, the object of whose incorporation was the institution of lodges throughout the State of New Hampshire and elsewhere for friendly co-operation and moral support, for the collection and accumulation of a benefit fund payable to certificate holders according to the terms and conditions of the certificate, and, as incident to the management of such fund, for the purpose of dealing in real and personal estate and of carrying on the business of general stockbrokers, provided that under the constitution and by-laws of the society all certificate holders who, at the time of the filing of the bill asking for the appointment of a receiver had failed to pay any assessment, including the last one levied, for thirty days after the same was called, and had not been reinstated under the by-laws, must be deemed to have retired of their own motion before the court intervened, and be treated as no longer members in good standing, and held to have no interest in the fund to be distributed. *Held*, that, though this was a different rule from that laid down in New Hampshire where the corporation was organized, it was substantially the same rule as that declared in this Commonwealth in *Fogg v. United Order of the Golden Lion*, 156 Mass. 431, and was correct. *Ibid*.

3. Without considering the question whether generally an endowment order has or has not the power to borrow money, or whether an action can be maintained against it upon its promissory note, it has the power to deposit its money in a trust company and to draw it out when needed, and, on the failure of the trust company, a claim against it accrues in favor of the order, which claim the order can assign by way of pledge. *Commonwealth v. Suffolk Trust Co.* 550.
4. The by-laws of an endowment order provided that the officers should be a president, clerk, treasurer, secretary, superintendent, and three trustees; that they should constitute a supreme executive board, with the power of directors; that they should have in general "all the powers of the corporation except as limited by the vote of the stockholders"; and that four should constitute a quorum. On July 25, 1891, E., the supreme treasurer and secretary, and G., the supreme president, having bought the shares of stock of the other incorporators, the other officers resigned except one, who with the two first named continued in office. Notices of these changes were sent to the certificate holders, and no question was made as to the validity of the transaction, or as to the authority of the treasurer and president to conduct the affairs of the order. At the time when E. and G. were elected president and secretary, they held the offices of superintendent and trustee, which offices they did not resign. There was nothing in the by-laws to show that a person could not hold two offices, and when the officers were first elected the same person was chosen both clerk and trustee. The order had a deposit in the A. Trust Company in the names of G., president, and E., treasurer, who, not being able to draw it as the company was in the hands of a receiver, borrowed, on September 25, 1891, a sum of money from the B. Trust Company and gave an assignment in writing of the claim of the order against the A. Trust Company as security therefor. The assignment purported to be the instrument of the order, to be executed by it "by E., Supreme Treasurer," and to be assented to "by G., Supreme President." *Held*, that, without considering whether E. and G. could legally act as directors under the by-laws, so as to hold a directors' meeting, it was clear that an invalid vote of the directors could be ratified by the order, and as E. and G. were then the only stockholders, and passed the vote, and had ever since acquiesced in it, and the order had received the benefit of the money, the receiver of the order could not ask a court of equity to forbid the payment of the debt out of the fund in the hands of the receiver of the A. Trust Company. *Ibid*.

See FOREIGN CORPORATION, 2-4; RECEIVER, 1, 4; SPECIFIC PERFORMANCE, 1.

BILL OF LADING.

See SALE, 3.

BOND.

See LIMITATIONS, STATUTE OF, 2; REVIEW; TRUST AND TRUSTEE.

BOSTON.

See SEWER.

BUILDINGS.

See EVIDENCE, 17-19; FIRES; FRAUDULENT REPRESENTATIONS, 1;
LEASE, 2, 4, 5; WIRES.

BURDEN OF PROOF.

See ACCIDENT INSURANCE, 1; FOREIGN LAWS, 2; FRAUDULENT
REPRESENTATIONS, 1; PRINCIPAL AND AGENT.

BY-LAWS.

See BENEFICIARY ASSOCIATION, 4.

CAPITAL AND INCOME.

See DEVISE AND LEGACY, 6; ESTATES OF PERSONS DECEASED, 3-5.

CASE STATED.

1. Upon a case stated, with the right reserved to either party to show any further facts, such further facts may be shown as well by inference from the facts admitted as by independent evidence. *McKim v. Glover*, 418.
2. The submission of a case to the Superior Court, and to this court on appeal, on agreed facts, which includes the proceedings in the Probate Court by which a trustee was appointed under Pub. Sts. c. 120, §§ 19, 20, and authorized to sell land subject to a contingent remainder, is a waiver of the objection that the proceedings in the Probate Court cannot be impeached collaterally. *Pratt v. Bates*, 315.

See CONFLICT OF LAWS; LIMITATIONS, STATUTE OF, 3.

CERTIFICATE.

See MECHANIC'S LIEN, 4.

CHAMPERTY.

See CONTRACT, 1.

CHARITY.

See PUBLIC CHARITY.

CHILD.

See CONSTITUTIONAL LAW, 1; HABEAS CORPUS, 1, 2.

CITY.

A city is not liable at common law or under St. 1887, c. 270, to a person in its employ who, in the exercise of due care, is injured by the breaking of a pole to which were attached the wires of the fire signal system of the city, although the pole broke because it was "negligently constructed, cared for, maintained, and placed" in its position. *Pettingell v. Chelsea*, 368.

See CONSTITUTIONAL LAW, 4; EVIDENCE, 13; HIGHWAY; STREET RAILWAY, 1; TOWN; WIRES.

COLLATERAL SECURITY.

See ASSIGNMENT, 3.

COMMISSIONER.

See GRADE CROSSING, 1, 5; TOWN, 2, 3.

COMMISSIONERS OF PUBLIC INSTITUTIONS.

See HABEAS CORPUS, 1.

COMMISSIONS.

See ESTATES OF PERSONS DECEASED, 1, 2.

COMPLAINT.

A complaint alleging that on a day named the defendant "did sell intoxicating liquor, to wit, lager beer, to certain persons whose names are unknown" to the complainant, does not charge a sale to several persons, but charges several sales to several persons, and combines distinct offences in one count; and as the defect is a formal one, no advantage can be taken of it for the first time in the Superior Court on appeal. *Commonwealth v. Early*, 186.

COMPOSITION WITH CREDITORS.

1. In determining under St. 1884, c. 236, as amended by St. 1885, c. 353, § 2, the number and value of the creditors of an insolvent debtor who have proved their claims in proceedings for composition, all are to be counted who have proved their claims up to the point of time when the judge proceeds to decide the question whether the assent filed is sufficient, and the other questions involved in determining whether the composition should be confirmed. *Fenton v. Graham*, 554.

2. A corporation, of which A. was president, assented, as a creditor of B., to an assignment of his property made by him for the benefit of his creditors; it being understood at the time of the assignment that B. should compromise with his creditors by paying them sixty per cent instead of the assignment being carried out. A. obtained from B. an agreement to pay A. a sum equal to forty per cent of B.'s indebtedness to the corporation, as compensation for money to be lent by A. to enable B. to carry out the contemplated compromise; and, as security for the money so to be lent and such compensation, B. executed to A. an assignment of his equity in the personal property which had been assigned in trust for the benefit of his creditors. In fact, B. received no money from A., but the compromise was carried out and the sixty per cent paid to the creditors, and B. received back from the assignees all the property remaining in their hands. A. then brought an action against B. for the conversion of the property, seeking to recover a sum equal to forty per cent of B.'s original indebtedness to the corporation. *Held*, that the action could not be maintained; and that the parties were not *in pari delicto*. *Brown v. Nealley*, 1.

See FRAUDS, STATUTE OF, 4.

CONDITION.

See ACCIDENT INSURANCE; DEPOSITION, 2; EMINENT DOMAIN, 3; LIMITATIONS, STATUTE OF, 2; SALE, 2; SPECIFIC PERFORMANCE, 1.

CONFLICT OF LAWS.

The effect of an action of trover upon the title of the plaintiff to property alleged to have been converted is to be determined by the law of the forum, but where the effect of such an action brought in another State is drawn in question here in an action submitted upon a statement of agreed facts which does not state the law of such other State, the law of this Commonwealth must be applied. *Miller v. Hyde*, 472.

See BENEFICIARY ASSOCIATION, 1, 2; FOREIGN CORPORATION; FOREIGN JUDGMENT; RECEIVER, 4; TROVER, 2.

CONSTABLE.

See ACTION, 4.

CONSTITUTIONAL LAW.

1. Pub. Sts. c. 48, § 18, St. 1882, c. 181, and St. 1886, c. 330, are constitutional. *Wares, petitioner*, 70.
2. The provision of St. 1888, c. 219, that "any beverage containing more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, . . . shall be deemed to be intoxicating liquor within the meaning of" Pub. Sts. c. 100, is constitutional. *Commonwealth v. Brelsford*, 61.

3. The St. 1890, c. 428, entitled "An Act to promote the abolition of grade crossings," is constitutional. *Norwood v. New York & New England Railroad*, 259.
4. The St. 1891, c. 370, entitled "An Act to enable cities and towns to manufacture and distribute gas and electricity," is constitutional. *Citizens' Gas Light Co. v. Wakefield*, 432.
5. A town acting through its water commissioners may legally contract to furnish a person with water for use in a boiler to make steam to heat his greenhouse. *Watson v. Needham*, 404.
6. There is no constitutional right on the part of landowners in this State to have the question of the necessity or expediency of the taking of land for a public use in any particular instance submitted to a court or jury, and in the absence of any provision in the statutes submitting the matter to a court or jury the decision of the question lies with the body or individuals to whom the State has delegated the authority to take. *Lynch v. Forbes*, 302.

CONTINGENT REMAINDER.

See CASE STATED, 2; DEVISE AND LEGACY, 2; PROBATE COURT.

CONTINUANCE.

See SUPERIOR COURT, 2.

CONTRACT.

I. *Making.*

1. A contract which contemplates merely a purchase of property, and provides that the services of the purchaser, who is an attorney at law, shall be paid for by giving him a share of the profits to be made by the purchase, is not champertous; and a question to the plaintiff whether he had released his interest in the property to the defendant was rightly excluded, if the plaintiff disclaimed all interest in it, and all the evidence showed that he had no interest, and that there was no question upon that point before the court. *Joy v. Metcalf*, 514.

See FRAUDS, STATUTE OF, 3; GIFT; GUARANTY, 2-4; LOAN; MASTER AND SERVANT, 1; MECHANIC'S LIEN, 2, 3; PARTY WALL, 1.

II. *Consideration.*

See GUARANTY, 2, 3.

III. *Validity.*

See ACTION, 6; CONSTITUTIONAL LAW, 5; FRAUDS, STATUTE OF; LEASE, 1.

IV. *Construction.*

2. The defendant, who was a shoe manufacturer and the owner of a patented invention relating to boots and shoes, appointed the plaintiff his

sole agent within a prescribed territory for the sale of shoes manufactured by him, and agreed that the plaintiff should have the "sole and exclusive sale of said shoes in said territory," and that the defendant would protect him from all infringements and infringement suits on account of said shoes. *Held*, that the defendant, in substance, agreed that no one else should have the right from him to sell his shoes in the prescribed territory, and that he would not sell shoes there himself, but that he did not guarantee the plaintiff against the sale there of such shoes, obtained elsewhere, by other persons over whom the defendant had no control, and that he meant that he would protect the plaintiff only from suits against him involving the validity of the patents contained in the shoes, and against any party infringing the patent. *Wiggin v. Consolidated Adjustable Shoe Co.* 597.

See ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 17; GUARANTY, 1; INSURANCE; LEASE, 2, 4, 5; PARTY WALL, 2.

V. *Performance and Breach.*

3. At the trial of an action for breach of contract by a town to furnish a person with water for use in a boiler to make steam to heat his greenhouse, it appeared that in the regulations which were made part of the contract the right to shut off the water in all cases when it became necessary to make extensions or repairs, and whenever the commissioners deemed it expedient, was expressly reserved. There was evidence tending to show that the damage to the plaintiff was not caused by the exercise of this reserved right, but by a leak which remained undiscovered until after the standpipe had been emptied and there was no longer any pressure in the service pipes; and the inference was warranted that due diligence was not used to discover such leaks quickly, to shut off the flow of water to the place of the leak, and to start pumping engines so as to prevent the standpipe from being emptied. *Held*, that the court might properly find a breach of the contract. *Watson v. Needham*, 404.

See ACTION, 1; CONTRACT, 6, 7; DAMAGES; EQUITY, 5, 6; MECHANIC'S LIEN, 1; SPECIFIC PERFORMANCE; VARIANCE.

VI. *Rescission.*

4. If A., who, as one of several associates, has subscribed for shares of stock in a corporation to be thereafter organized, gives oral notice of the withdrawal of his subscription, during an interview between them, to B., who is acting as the representative of the associates, and who, at a meeting two days previously for the organization of the corporation, has been chosen president, the choice of officers being by the laws of the State in which the corporation is organized a necessary preliminary to the creation of the corporation, such notification of withdrawal is sufficient, although the association does not come into legal existence as a fully formed corporation until a later date. *Hudson Real Estate Co. v. Tower*, 10.
5. A subscription for shares of stock in a corporation to be thereafter organized may be withdrawn before the organization of the corporation,

although the associates have taken action on the strength of such subscription. *Hudson Real Estate Co. v. Tower*, 10.

6. In an action for a breach of contract where the plaintiff declares upon a contract which at the trial is found to have been superseded and modified by a later one, he cannot by an amendment of the declaration recover upon the later contract if it appears that, before the defendant was in default under the later one or had notified him of an intention not to perform it, he himself repudiated it by notifying the defendant that he would not perform it on his part, thus giving the defendant the right to rescind the contract. *King v. Faist*, 449.
7. By the terms of a contract for the sale and delivery of a quantity of flour, the vendor was to ship the flour specified as the vendee might direct, drawing upon him demand drafts for the flour shipped, and the vendee was to take out the flour by a certain date and to honor the drafts. A month before the time limited for withdrawing the flour the vendee wrote to the vendor, "Before we pay any more drafts we want some assurance from you that that you will make good any claims on account of quality," and stated orally to the agent of the vendor that he would pay no future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality, and he returned a draft of the vendor unpaid. The vendor thereupon wrote, "We are not going to send any more flour." *Held*, that the vendor had a right to rescind the contract, the vendee having, without justification, declared his intention not to perform it; and that the letter of the vendor was an effectual rescission, and relieved him thereafter from all obligation under the contract to deliver the flour. *Ibid*.

See ACTION, 3; EVIDENCE, 5; GUARANTY, 6; SALE, 2, 3.

CONTRIBUTORY NEGLIGENCE.

See DOG; EMPLOYERS' LIABILITY ACT, 2; MASTER AND SERVANT, 7, 9
NEGLIGENCE, 1, 4, 6, 8, 9.

CORPORATION.

On a petition by a gas and electric light company to compel a town to purchase its plant, etc., agreeably to the provisions of St. 1891, c. 370, it appeared that a schedule required by the statute was filed by the secretary of the company under the authority of a vote of its directors, and that the stockholders at a meeting called to take action upon the proposition to sell, etc., and to transact such other business as should come before the meeting, ratified the action of the directors. but this was more than thirty days after the passage of the final vote by the town that it was expedient to exercise the authority conferred by the statute. It did not appear that there was any change of position on the part of either of the parties between the action of the directors and that of the stockholders, and the petitioner duly filed its petition within sixty days after the filing of the

schedule. The town took no action to rescind its votes between the time of filing the schedule and the vote of the stockholders, if such action could have been taken, and the petitioner never attempted to repudiate the action of the directors. *Held*, that the vote of the stockholders must be considered as within the call for the meeting at which it was passed, and that, without considering whether the determination to sell the property and to file the schedule according to the statute was within the authority of the directors, and assuming that the filing of the schedule within the thirty days was to be treated as a condition precedent to the right of the company to enforce the obligation of a town to purchase its property, the ratification by the stockholders must be taken as equivalent to original authority. *Citizens' Gas Light Co. v. Wakefield*, 432.

See ASSIGNMENT, 2, 4; BENEFICIARY ASSOCIATION; CONTRACT, 4, 5; EMINENT DOMAIN, 3; EVIDENCE, 5; FOREIGN CORPORATION; NEGLIGENCE, 2-5; RAILROAD, 1-3; RECEIVER; WIRES.

COSTS.

See DEPOSITION, 2; FOREIGN LAWS, 3.

COUNTY COMMISSIONERS.

See EVIDENCE, 22; RAILROAD, 1.

COURTS.

See CONSTITUTIONAL LAW, 6; RECEIVER, 4; SUPERIOR COURT.

COVENANT.

See LEASE, 3.

CREDITORS.

See ASSIGNMENT, 4; COMPOSITION WITH CREDITORS; EQUITY, 2, 4; FOREIGN CORPORATION, 1, 2, 4.

CREDITOR'S BILL.

See EQUITY, 2.

CRIMINAL LAW.

See COMPLAINT; CONSTITUTIONAL LAW, 2; EVIDENCE, 2-4, 9, 21; EXCEPTIONS, 8; GAMING; HOUSE OF CORRECTION; INTOXICATING LIQUORS; LARCENY; WITNESS, 1.

CUSTOM.

See EVIDENCE, 1; INSURANCE.

DAMAGES.

In an action against a town for breach of contract to furnish the plaintiff with water for use in a boiler to make steam to heat his greenhouse, whereby injury was caused to his growing crop of lettuce by freezing, the ruling that the plaintiff is entitled to recover the full amount of damage is correct. *Watson v. Needham*, 404.

See ABUSE OF LEGAL PROCESS, 2; ARREST, 1; EVIDENCE, 6, 10-12, 19; GRADE CROSSING, 6; HIGHWAY, 1; SEWER; WARRANTY.

DEATH.

See PASSENGER, 2, 3.

DECEIT.

See FRAUDULENT REPRESENTATIONS.

DECLARATION.

See ACTION, 1, 2; CONTRACT, 6; EXCEPTIONS, 6; FRAUDULENT REPRESENTATIONS, 3, 4, 7; JUDGMENT; VARIANCE; VERDICT, 4.

DECREE.

See APPEAL; ASSIGNMENT, 4; BENEFICIARY ASSOCIATION, 1; DIVORCE; EQUITY, 9-13; PROBATE COURT; SPECIFIC PERFORMANCE, 1.

DEED.

On a bill in equity filed for the cancellation of a deed, it appeared that the plaintiff signed and sealed a deed purporting to convey a parcel of land to the defendant, and caused it to be recorded. He then received it back, but did not hold it as the agent or guardian of the defendant or on his behalf. It never was in the possession of the defendant or of any one representing him, and the plaintiff, on request, refused to surrender it. Before such request, but after he had received it back from the registry, he communicated its existence to the defendant, and spoke to him of the land described in it as his, as he then supposed it was. The defendant assented to the transaction so far as he could when told of it. When the plaintiff had the deed recorded, he meant to pass the title to the defendant, and supposed he was doing so, but throughout he kept possession of the land. *Held*, that the deed was never delivered, or became operative, and that the plaintiff was entitled to a decree. *Barnes v. Barnes*, 381.

See EVIDENCE, 22; LEASE, 3.

DEFAULT.

See SUPERIOR COURT.

DELIVERY.

See ASSIGNMENT, 1, 3; DEED; SALE.

DEMAND.

See DEPOSITION, 2; MORTGAGE, 2.

DEMURRER.

See EQUITY, 7; FRAUDULENT REPRESENTATIONS, 3.

DEPOSITION.

1. If the facts testified to in a deposition of one of the parties to an action are material to the issues both in that action and in a later one between the same parties, the deposition is competent evidence in the later action where the deponent has died before the trial. *Radclyffe v. Barton*, 327.
2. The forty-first rule of the Superior Court, which provides that "when a deposition has been filed, if not read on the trial by the party taking it, it may be used by the other party, if he sees fit, he paying the costs of taking the same," does not state a condition precedent; and while it is in the discretion of the presiding justice to exclude a deposition so offered in evidence, if the costs are not paid on the demand of the party taking it, yet if no demand is then made, and the deposition is admitted, it is no ground for thereafter holding it to be improperly admitted that the costs of taking it have not been paid or tendered. *Ibid.*

DEVISE AND LEGACY.

1. After creating a trust by will for the benefit of his children, a testator provided : "Upon the decease of any of my said children, A., B., C., and D., I give . . . that portion of my estate of which the income is above given to him or her for life, to his or her children, their heirs and assigns forever. And if either of them shall die leaving no child or more remote descendant then living, I give . . . such share to the others of said four children in equal shares, their heirs and assigns forever." A. died in 1891, leaving four children. D. died in 1892, unmarried and without issue. *Held*, that the portion of the testator's estate held in trust for D. during life passed to the executor of and trustee under the will of A., and not to A.'s four children. *Cummings v. Stearns*, 506.
2. A vested interest in an equitable contingent remainder is devisable, transmissible, and assignable subject to the contingency upon the happening of which its value depends. *Ibid.*

3. A testator by his will gave to his son "the sum of ten thousand dollars, to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age. I also give to him the sum of twenty thousand dollars, to be paid to him when he shall attain the age of twenty-five years, together with the further sum of twenty thousand dollars, to be paid to him when he shall attain the age of thirty years." The son died before attaining the age of thirty years, and after the time when, had he lived, he would have reached that age, his administrator brought an action to recover the third legacy. *Held*, that the legacies vested in the son on the death of the testator, and that only the time of payment was postponed until he should reach the ages respectively prescribed. *Wardwell v. Hale*, 396.
4. After giving to his wife his household goods, etc., a testator gave the residue of his property to trustees to pay to his wife the net income for life, after her decease an annuity for life to her niece, and as soon as might be after his wife's decease certain money legacies, one of which of ten thousand dollars was on a condition, and immediately after his wife's decease to set apart a trust fund of five thousand dollars for one of his nephews. The sixth clause of the will gave two third parts of the residue to two of the trustees as their own, and the seventh clause was as follows: "It is my will that said surviving trustees, from and after the decease of my said wife, (subject to the payment of said annuity and legacies,) continue to hold in trust the other undivided third part of said rest and residue of my said property and estate, including the amount of said legacy of ten thousand dollars, should the same be forfeited for non-compliance with the condition thereto annexed, and also including any unexpended portion of said trust fund of five thousand dollars, but in trust, nevertheless, to be held, managed, and invested by them with a view to safety and profit, and the net income thereof paid semiannually to my niece A. for and during her life; and, to take effect at her decease, I give, bequeath, and devise said third part to her children, in equal shares, to them, their heirs, executors, administrators, and assigns forever." At the time of the making of the will and at the death of the testator A. had four children, three of whom were living at the time of A.'s decease, one having died previously never having had any children. *Held*, that a right to one fourth of the trust estate vested in each of the children at the testator's decease, and that the share of the deceased child, so far as real estate being less than five thousand dollars in value, passed to her husband under Pub. Sts. c. 124, § 1, and, so far as personal property, was to be paid over to her administrators to be disposed of according to law as assets of her estate. *Marsh v. Hoyt*, 459.
5. A testator, who was not a lawyer, by his will drawn by himself gave all his estate to his wife for life with remainder over of portions thereof to nephews and a charity, and the residue he left to his wife "to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of above to my heirs at law." *Held*, that the wife

was given a power of disposal thereof by will as well as by deed during her life. *Burbank v. Sweeney*, 490.

6. A testator by will gave to executors a certain sum in trust to pay or expend the income so far as practicable to or for his widow, A., during life, and upon her death to pay the entire sum and all income thereof then in their hands to her daughter, B., and if not then living, to pay said sum and income to the issue of B., if she should leave issue surviving A., but if neither B. nor any issue of hers should survive A. then said sum and income should go to the residuary legatee. All the other legacies in the will were pecuniary ones; and A., the widow, having waived the provisions of the will, there remained after payment of her thirds and the allowances made by court and the expenses of administration a sum sufficient to pay but a little over sixty-eight per cent upon all the legacies. *Held*, that the income upon sixty-eight per cent of the sum given in trust was to be accumulated until the death of A., and then the entire fund, principal and income, was to be paid to B. if living, and if not living then as directed in the above clause of the will. *FIELD, C. J., ALLEN & KNOWLTON, JJ.*, dissenting as to the disposition of the income. *Sawyer v. Freeman*, 543.
7. A testator, at the time his will was made, had four sons, four daughters, and children of a deceased daughter living. By his will, he gave two equal ninth parts of the residue of his estate to his two sons A. and B., in fee, and the other seven equal ninth parts thereof to A. and B. and the husband of the deceased daughter in trust, to invest the same and pay the income of one of such equal ninth parts respectively to each of his four daughters, to each of his two sons C. and D., and to the children of the deceased daughter, during their respective lives, "and if either of the beneficiaries of the said trust shall die leaving no issue surviving, then it is my will that the portions herein given for the benefit of said deceased be equally divided among the others, the issue of any deceased child taking the same proportion as that the parent would have taken if living, and the children of" the deceased daughter "taking an equal share with one of her said eight brothers and sisters." C. died after the testator's death, leaving no issue. *Held*, that C.'s share of the trust fund was to be divided into eight equal parts, and A. and B. were each entitled to one of such parts. *Niles v. Almy*, 29.
8. A testator by the fourth article of his will left a sum of money in trust to pay the income to his wife during her life, and after her death to distribute the principal to his children. By the fifth article he established a trust for the shares of his daughters, and by article six he provided that "All moneys herein directed to be given to each of my sons A. and T. shall be held, invested, and managed by my said trustees in separate trusts, and the net income of his several share be paid to each of said sons" during life, with remainder over. By a subsequent article provision was made for another son, and by article nine the residue of the property was given to trustees in trust to invest and manage the same, paying the income to all the children equally, and on a certain day, or sooner if the fund was large enough to give to each child a "sum of money amounting

to not less than \$50,000," to distribute the principal among the children. In a later article he authorized his trustees to sell the trust property. *Held*, that the share of A. in the residue, as given in article nine, was to be held for him in trust under the provisions of article six, and that he was not entitled to have it paid over to him absolutely. *Iasigi v. Iasigi*, 75.

See ESTATES OF PERSONS DECEASED, 2-5; PUBLIC CHARITY.

DISTRICT COURT.

See POOR DEBTOR.

DIVIDEND.

See ASSIGNMENT, 4; FOREIGN CORPORATION, 2-4.

DIVORCE.

1. On a petition praying that a decree absolute and a decree *nisi* in a libel for divorce might be vacated, and that the libel might be dismissed, and for other relief, the court could properly, in the same proceeding, not only vacate the decrees, but dismiss the libel. At the hearing the respondent offered to show that he was never lawfully married to the petitioner, and that the libel should be dismissed on this ground. *Held*, that, as there were other grounds on which the libel must be dismissed, it was in the discretion of the court whether it would or would not hear the evidence offered. *Wiley v. Wiley*, 446.
2. When there are several grounds on which a libel for divorce may be dismissed on the merits, the libellant has not necessarily, as matter of strict law, the right to select for the court the particular ground on which it must act, and to have this incorporated in the decree. *Ibid*.
3. On a libel for divorce it appeared that a former libel between the same parties was dismissed for want of jurisdiction "without prejudice." *Held*, that, there being no limitation upon the effect of the words "without prejudice," they must be taken to have been used generally, and to mean without prejudice to the right of the libellant to bring a new suit and to try it as if the questions involved were all presented for the first time. *Burtis v. Burtis*, 508.

See DOMICIL; FOREIGN LAWS, 3.

DOG.

1. Where a person interferes with his dog and another dog who are fighting, and is bitten, he must, in an action brought under the Pub. Sts. c. 102, § 93, show that he was using due care, and it is a question for the jury whether the circumstances warranted his interference. *Raymond v. Hodgson*, 184.

2. The leading of a horse behind a wagon on a country road is not such contributory negligence as will preclude the owner from maintaining an action, under the Pub. Sts. c. 102, § 93, against the owner of a dog by whom the horse is bitten while being so led. *Boulester v. Parsons*, 182.

DOMICIL.

The theory of law, that husband and wife are one person, and, wherever the wife may be actually, she is constructively with her husband, is not applicable to a wife who remains in a place where she and her husband last lived together after he is gone, and brings a suit against him for a divorce founded on his misconduct while they were together. She may retain her old domicil, acquired when she and her husband were actually abiding in the same place, and is not compelled to follow him to a place where she never lived merely because before she discovered his offence she intended to go there with him; but this exception to the general law of domicil has no application in suits brought by the husband against the wife for her misconduct. *Burtis v. Burtis*, 508.

See BENEFICIARY ASSOCIATION, 1, 2; FOREIGN CORPORATION, 4; TAX, 2.

DOWER.

Where a widow has not continued to occupy, with the heirs of her deceased husband, land of which he died seised, or to receive her share of the rents and profits thereof, her right of dower is not saved, under Pub. Sts. c. 124, § 13, by the fact that she occupied the land and received the rents and profits with the heirs for several years, if her writ is not brought when she ceases to occupy the land or to receive the rents and profits, and not until more than twenty years after his death, but is barred by § 14. *O'Gara v. Neylon*, 140.

DRAIN.

See LANDLORD AND TENANT.

DUE CARE.

See DOG; EMPLOYERS' LIABILITY ACT, 2; MASTER AND SERVANT, 7, 9; NEGLIGENCE, 1, 4, 6, 8, 9.

ELECTRICITY.

See CONSTITUTIONAL LAW, 4; CORPORATION; EVIDENCE, 13; NEGLIGENCE, 2-5; STREET RAILWAY, 2; TELEGRAPH AND TELEPHONE COMPANIES; TOWN; WIRES.

EMBEZZLEMENT.

See EVIDENCE, 11.

EMINENT DOMAIN.

1. Where one of the articles in a warrant for a town meeting is "to appropriate money for laud for the extension of our water supply and to authorize the treasurer to borrow the same," and the town votes that "such land shall be purchased or taken for extension of the water supply of the town as the selectmen and water board for the time being shall decide to be for the best interests of the town," it is not necessary that the town should subsequently designate the specific land to be taken, or that it should formally ratify what has been done by the selectmen and water board. *Lynch v. Forbes*, 302.
2. Under St. 1872, c. 343, § 4, which was incorporated by reference into St. 1888, c. 131, expressly providing that the town of B. might exercise the "rights, powers, and authorities" given to it by the act "in such manner, and by such commissions, officers, agents, and servants as said town shall from time to time choose, ordain, appoint, and direct," the town properly could delegate the power of taking land for a public use to the selectmen and water board, and the taking when completed by them became the act of the town. *Ibid*.
3. Under St. 1893, c. 281, authorizing a town to take by purchase or otherwise the franchise or corporate property of a water company "on payment to said corporation of the actual cost of its franchise, works," etc., payment is not a condition precedent to the taking, and the water company cannot maintain a bill in equity to enjoin the town, after the taking and before payment, from preventing the laying of water pipes by the company. *Rockport Water Co. v. Rockport*, 279.

See CONSTITUTIONAL LAW, 5, 6; EQUITY, 7; EVIDENCE, 22; GRADE CROSSING, 4, 6; SEWER.

EMPLOYERS' LIABILITY ACT.

1. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, by having his fingers cut off by a circular saw upon which he was put to work by the defendant's foreman, the plaintiff testified that the foreman "kept himself at work pretty much all the time in getting out lumber, or piling it up, or arranging it, and in operating saws." Another workman testified that the foreman was the person who gave him his orders, but he did not know whether he gave orders to anybody else; "that he had also seen him grinding tools, piling lumber, and keeping busy generally"; and that the foreman "kept pretty busy at work and spent most of his time at work." *Held*, that the evidence did not justify a finding that the foreman was a person whose sole or principal duty was that of superintendence, within St. 1887, c. 270, § 1, cl. 2. *O'Brien v. Rideout*, 170.
2. At the trial of an action for injuries occasioned by the caving in of the side of a sewer trench which was thirty or forty feet long, twelve or fifteen feet deep, three feet wide at the top and one and a half feet wide at the bottom, where the plaintiff was at work, there was evidence tending to

show that there was no bracing in the trench except two blocks consisting of portions of earth about four feet wide left untouched, so as to form braces which were about twenty-five feet apart; that there was no unexpected or extraneous cause for the caving in of the earth, and that the accident seemed to have resulted from natural causes; that there was a foreman in charge of the work, whose sole or principal duty in the service of the defendant was that of superintendence, which included the duty of taking proper precautions for the safety of the men at work in the trench; and that the plaintiff was a person of experience in digging trenches, whose duties did not require him to study the conditions affecting the stability of the earth at the sides of the trench, or to do anything except to work under the directions of the foreman. *Held*, that the evidence should have been submitted to the jury, who could have properly inferred that the foreman in charge of the work was negligent, and that the plaintiff was in the exercise of due care. *Hennessy v. Boston*, 502.

See CITY.

ENTRY FEE.

See APPEAL, 3.

EQUITY

I. *Jurisdiction and General Principles.*

1. When a street railway corporation is constructing its road, in accordance with the powers conferred upon it by its charter, over a location granted to it by the selectmen of a town, and is using or intending to use the safeguards pointed out by the statutes of the Commonwealth, this court has no power to say that it must use other and different safeguards. *Old Colony Railroad v. Rockland & Abington Street Railway*, 416.
2. A wife filed a petition against her husband in the Probate Court, under Pub. Sts. c. 147, § 33, and an attachment of his property was ordered by that court, but none could be found which could be attached. Before a decree had been rendered by the Probate Court on the wife's petition, she filed a bill in equity to reach and apply certain mortgages and mortgage notes of her husband which could not be attached or taken on execution in a suit at law, and to hold them until she could obtain a decree in the Probate Court, and to then apply them in satisfaction of the decree. *Held*, that until it was decided by the Probate Court that she was living apart from her husband for justifiable cause, and was entitled to be supported by him under Pub. Sts. c. 147, § 33, and a decree entered in her behalf for a definite sum of money, there was no debt due to her from her husband, and she was not a creditor within the meaning of Pub. Sts. c. 151, § 2, cl. 11, and § 3. *Willard v. Briggs*, 58.
3. A court of equity cannot decide whether a wife is living apart from her husband for justifiable cause, and is entitled to be supported by him under Pub. Sts. c. 147, § 33. *Ibid*.

4. An assignee in insolvency cannot maintain a bill in equity against a judgment creditor of the insolvent debtor, to recover the value of property of the insolvent taken on execution to satisfy a judgment obtained against him on a promissory note given without consideration prior to the institution of proceedings in insolvency with a view to giving a preference, but his remedy is by an action at law under Pub. Sts. c. 157, § 96. *Ames v. Sheehan*, 274.
 5. A homestead estate was devised in equal shares to A. and B., children of the testator. In 1876 B. signed a memorandum of sale of his share of the estate to A., who thereupon paid B the price named in the memorandum, which stated no time for performance, and entered into possession of the estate, made permanent improvements thereon, and continued in possession thereof. The testator left debts to a considerable amount and personal property insufficient to pay them, and A. paid the same and discharged the estate from them. In a correspondence between A. and B., the latter expressed his willingness more than once, and as late as 1885, "to stand by" the agreement of sale, and did not refuse to convey to A. until 1889. *Held*, upon a bill in equity brought in 1892 by A. against B. to compel a conveyance of B.'s share of the estate to A., that B. held the legal title as trustee for A.; that the defence of laches had no application; that the statute of limitations did not operate as a bar; and that the bill could be maintained. *Ryder v. Loomis*, 161.
 6. The entry of judgment for the tenant in a real action, in which he pleaded *nul disseisin*, is not a bar to a bill in equity by the demandant, to compel the tenant to convey the same land to him, upon the ground of an implied trust arising out of an agreement to sell the land. *Ibid*.
- See ASSIGNMENT, 4; EMINENT DOMAIN, 3; FOREIGN LAWS, 3; MORTGAGE, 7; PRINCIPAL AND AGENT; SEWER; SPECIFIC PERFORMANCE.

II. Pleading and Practice.

7. An averment in a bill in equity, brought to restrain a town from taking the land of the plaintiff for the purpose of increasing its water supply, that the town had previously taken all the land that it was authorized to take, is a conclusion of law, and not such an allegation of fact as would be admitted by the defendant's demurrer. *Lynch v. Forbes*, 302.
8. This court will not consider questions not raised in the court below, and about which nothing appears in the evidence reported. *Old Colony Railroad v. Rockland & Abington Street Railway*, 416
9. Upon an appeal from a decree of a justice of the Superior Court dismissing a bill in equity, after a hearing upon the merits, the evidence having been taken under the rule and reported to this court, and there being no findings of fact and no rulings of law, the decree is to stand, unless, after giving due weight to the decision of the justice who heard the case, it clearly appears to be erroneous. *Biggerstaff v. Marston*, 101
10. If, upon the evidence before him, it was competent for the single justice who heard a suit in equity to find a state of facts which would justify the decree ordered by him, this court will assume, upon an appeal from the

decree, the evidence having been reported, that he has so found, and that the decree is the result of the application of correct rulings of law to those facts. *Biggerstaff v. Marston*, 101.

11. Upon an appeal from a decree of a single justice dismissing a bill in equity, the evidence having been reported, if facts might be found on an examination of the evidence which would give the plaintiff a right to relief, yet where the finding of those facts depends upon conflicting evidence of the weight of which the justice had the best means of judging, this court cannot say that the decree is clearly erroneous. *Ibid*.
12. A decree, dismissing a bill in equity for the cancellation of a mortgage of land and note secured thereby, given by the plaintiff to a third person and by the latter assigned to the defendant, before maturity, the plaintiff having, in ignorance of the assignment, made payments of principal and interest to the assignor, should be modified so as to be without prejudice to the plaintiff's right to redeem the land from the mortgage. *Ibid*.
13. A mortgage of land, by the terms of which the mortgagor covenanted to pay the debt to B. "or his executors, administrators, or assigns," and a note secured thereby payable to B. "or order," were given for value by the mortgagor to A., whose clerk B. was, and who allowed his name to be used at A.'s request. On the next day B., also at A.'s request, assigned the mortgage together with "the note and claim thereby secured" to C., who paid value therefor to A. The mortgage and note were delivered to C., who thereafter retained them in his possession, but the note was not indorsed by B. to C. until after its maturity. The mortgagor had no actual notice of C.'s ownership of the mortgage and note, and, assuming that A. was the real party in interest, paid the principal and interest to him before maturity. A. paid to C. only the amounts of interest received by him, and afterwards absconded. *Held*, upon a bill in equity by the mortgagor against C. for the cancellation of the mortgage and note, that the mortgagor made the payments to A. at his own risk; and that the bill should be dismissed, without prejudice to his right to redeem, on paying the principal of the mortgage with interest from the date of the last payment received by C. *Mulcahy v. Fenwick*, 164.

See APPEAL; BENEFICIARY ASSOCIATION, 4; FOREIGN CORPORATION, 1, 2;
PROBATE COURT; RECEIVER.

ESCROW.

See EVIDENCE, 22.

ESTATES OF PERSONS DECEASED.

1. The contention that executors are not entitled to compensation for the sale of real estate does not arise if the commission charged was, with other commissions, disallowed in the Probate Court, and a lump sum was allowed for their services, and the allowance was affirmed by a single justice of this court, no reason being shown why the sum so allowed was not a fair and reasonable compensation. *Little v. Little*, 188.

2. A will which contemplated the keeping of nearly the whole principal in the hands of trustees for a long period provided that one of the trustees, who had had the full management of the estate for some years in the testator's lifetime as his agent under salary, should continue such management, receiving compensation independent of the trustees' commissions at the same rate as his former salary. After the probate of the will an agreement by which this salary was reduced was made by all parties, two of whom afterwards contended that the payments of compensation on this account should be disallowed, because not justified by the will before the trustees were appointed by the Probate Court. *Held*, that it was the intention both of the testator and the parties to the agreement that there should be no interruption in the services to be rendered, and that the decree allowing the charges for this compensation was right. *Little v. Little*, 188.
3. The same persons were named by a will as executors and trustees, and all the property, real and personal, was devised to them. Without objection they qualified as executors only, and proceeded in the management of the estate as a whole, without objection or protest, distributing the income from time to time among the beneficiaries. Expenditures by them upon the real estate, in the nature partly of permanent improvements, and partly of repairs, were found to be wise, judicious, and necessary. So far as the expense of these charges was defrayed with the capital, two of the beneficiaries contended that they ought not to be allowed, because the executors had not been appointed trustees by the court. *Held*, that, although it would have been more regular for them to have qualified as trustees in the first instance, they were the persons to whom the property both real and personal was given by the will, and who had a right as trustees to make the expenditures; and that the objection was fully answered by the fact that since becoming trustees they had in that capacity adopted and ratified their acts as executors. *Ibid*.
4. Where real property is left in trust to pay the income to one class, and the principal eventually to another class, the general rule is that repairs come out of income and substantial improvements out of capital, and there is no distinction that a line should be drawn at the death of the testator so that repairs then needed should be called improvements; and if it is impossible for the executors acting as trustees to separate by items the amounts chargeable to reconstruction and the amounts chargeable to repairs, because the repairing was done in the course of reconstruction and by the same men at the same time, an apportionment by the executors of the expense of the work according to their best judgment, charging to income the expense of so much of the work as they considered repairs, and to capital so much of the work as they considered reconstruction, will not be disturbed by this court. *Ibid*.
5. A testator gave his entire estate to trustees to pay over the net income to his six children, two of whom were two of the three executors and trustees. The first two accounts were allowed by the Probate Court without objection, after the publication of citations, and the third was assented to by four of the six beneficiaries, two of whom were executors and trustees,

and objected to by two beneficiaries, who are the appellants and contestants. The accounts were corrected by crediting to income and charging to capital a certain sum, and the contestants not only claimed two sixths of that sum, but contended that the remaining four sixths should be held by the trustees, so that the contestants would get two sixths of the income of it, the other four beneficiaries being entitled to no part of it, as they had assented to the accounts. *Held*, that the contention was untenable, as the error was not one of administration but of accounting. *Little v. Little*, 188.

See DEVISE AND LEGACY, 4; DOWER; TAX, 2.

ESTOPPEL.

See ARREST, 1; TROVER, 2.

EVICITION.

See LEASE, 2.

EVIDENCE.

1. In an action for personal injuries occasioned to the plaintiff, while employed in the defendant's factory, by coming in contact with a machine having a dangerous device, which was in use when he entered the employment, evidence of a custom in other factories using similar machines to guard the device is immaterial. *Rooney v. Sewall & Day Cordage Co.* 153.
2. Evidence that the defendant has been convicted of the offence of illegally selling intoxicating liquors, is admissible at the trial of a complaint for keeping and maintaining a liquor nuisance during a period which includes the date of such sale. *Commonwealth v. Brelsford*, 61.
3. At the trial of a complaint for keeping and maintaining a liquor nuisance, a certificate by the State assayer of the result of his analysis of certain beer is admissible in evidence for the purpose of identifying the beer so analyzed as that taken from the defendant's premises. *Ibid.*
4. The fact that samples of liquor were taken illegally from the defendant's premises by police officers does not render evidence that they were found by analysis to contain more than one per cent of alcohol incompetent at the trial of a complaint for keeping and maintaining a liquor nuisance. *Ibid.*
5. In an action by a corporation to recover the amount of a subscription for shares of stock therein, claimed by the defendant to have been withdrawn before the corporation was organized, the conversation between the solicitor of the subscription and the defendant when he made his subscription, the statements made by the solicitor at a meeting of the associates in regard to the nature of the defendant's subscription, a conversation between the defendant and the representative of the associates tending to show a revocation of the subscription if it was voted by them to do a certain act, and the subsequent passing of such a vote, are admissible in

evidence for the purpose of showing the withdrawal of the defendant's subscription before the organization of the corporation; and, being limited to that purpose by the judge in his instructions to the jury, the plaintiff has no ground of exception. *Hudson Real Estate Co. v. Tower*, 10.

6. While at the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, a wide range of evidence may be admissible, in the discretion of the presiding justice, upon the injury caused to the value of the plaintiff's business considered as a whole, and to what is called its good will, yet he cannot show the course of his business from its inception down to the time when he sold it out, eleven months after the date of the attachment, which included a period of nine years prior to the attachment, during the first two of which he had a partner, and in the nine years his connecting stores had come to have twenty-four departments; nor can he testify that there had been a steady and large increase in the business year by year, but that the increase in 1889, in February of which year the attachment was made, was as a whole less than the increase for January of that year, so that the business for the part of the year subsequent to the attachment decreased. *Zinn v. Rice*, 571.
7. A. bought a stable, mortgaged it to B., and allowed C. to run it. The mortgage being in course of foreclosure by sale, and A. not being able himself to raise the money to pay it, he told C. that, if he could find some one who would pay off the mortgage, A. would release to C. all claims to the stable. C. thereupon raised the money and paid the mortgage, and A. gave him a bill of sale of the stable, releasing his interest therein to C. In an action by A. against C. for money paid in the purchase of the stable, A. contended that he bought and paid for it at C.'s request and for his use; and C. contended that A. bought it, not at C.'s request, but substantially as a present for him. A. testified that he sent an attorney "on business relative to this transaction" to attend to A.'s claim, to protect C., and to raise the money if he could. *Held*, that evidence of statements made by A.'s attorney to the attorney representing B. in the foreclosure proceedings, that A. was relinquishing all right to the stable, and C. was thereby making a thousand dollars, was rightly excluded. *Creed v. Creed*, 107.
8. In an action for money paid, evidence that the defendant had been summoned or was chargeable in another action, as trustee in respect of the money now sued for, is inadmissible. *Ibid*.
9. In an action for malicious prosecution on a criminal charge, the plaintiff may show that in the record of "No bills" returned by the grand jury to whom the alleged criminal charge against him was presented, the substitution of the letter P for the letter F as the initial of his middle name was a clerical error, and that he was the person meant. *Wheeler v. Hanson*, 370.
10. In an action for malicious prosecution on a criminal charge, evidence as to what the plaintiff paid sureties to go upon the bond required of him for his appearance in the Superior Court, and what he paid for counsel fees, was properly admitted, as was also the evidence as to the nature of the

plaintiff's employment, and the tools required in it, the difficulty which after his discharge he had in obtaining employment, the amount of his earnings before and after the criminal prosecution, the injury to his feelings and reputation, and the indignity which he suffered. *Wheeler v. Hanson*, 870.

11. In an action for malicious prosecution on a charge of embezzlement of goods from the defendant's store, evidence that land was taken by the plaintiff from a purchaser in payment for the goods at a price greatly above its real value would have no tendency to show that the defendant had probable cause for believing that the plaintiff had embezzled the goods, and is not admissible in mitigation of damages. *Ibid.*
12. In an action for malicious prosecution evidence as to damages after the date of the writ is admissible. *Ibid.*
13. In an action by a lieman employed in the fire alarm service of the city of Boston against an electric lighting company for injuries received from contact with one of its wires charged with electricity and left uninsulated, at a point close to a frame structure owned by the defendant, and standing upon the roof of a building owned by a third person, to the arms of which the company's wires and those of the fire alarm service were attached, and upon which the plaintiff in the performance of his duty was required to go, evidence is admissible, as having some tendency to show that the wires of the fire alarm service were attached to the structure by the permission of the defendant, and under some contract with it whereby the city was to pay a portion of the expense of the maintenance of such structure, that a bill was rendered by the defendant to the city of Boston and paid by it for its proportionate part of the expense of repairing the roof upon an adjoining building where there was another structure belonging to the defendant, and from which its wires and those of the fire alarm service extended to the structure where the accident happened. *Illingsworth v. Boston Electric Light Co.* 583.
14. In an action for personal injuries occasioned to the plaintiff, a boy eighteen years old, by having his arm caught in a machine upon which he was working in the defendant's employ, the plaintiff asked a witness called as an expert the following question: "Should you consider that a boy eighteen years old, a short boy like the plaintiff here, was a proper person to put to work on such a machine as that before you?" *Held*, that the question was rightly excluded. *McGuerty v. Hale*, 51.
15. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ at work upon a machine, the plaintiff asked A., the defendant's foreman, who was a witness for the plaintiff, concerning B., a fellow workman, "What should you call him?" The judge excluded the question, but told the plaintiff's counsel that he might inquire of the witness as to B.'s appearance, his ability and capacity to work, and his general mental capacity, so far as he observed it. *Held*, that the plaintiff had no ground of exception. *Ibid.*
16. In an action for personal injuries occasioned to the plaintiff while at work upon a machine in the defendant's employ, the declaration alleged that the defendant did not use reasonable care to furnish, and did not

furnish, competent fellow workmen. The defendant, in his direct examination, was allowed, against the plaintiff's objection, to answer the question whether A., his foreman, was a careful man or not. It did not appear what the answer was; but it appeared that the plaintiff, on cross-examination, asked the defendant whether A. was a fairly careful man, and the defendant answered, "I should say so." It also appeared that the plaintiff did not claim that A. was incompetent. *Held*, that the evidence that A. was a careful man was admissible, even if his competency was conceded. *McGuerty v. Hale*, 51.

17. An action was brought by a lessee against his lessor for a breach of the terms of a lease which recited that the lessor let "all the brick building recently erected by me on the northerly corner of S., P., and S. M. Streets in the said B., with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same." *Held*, that for the purpose of showing what building was covered by the lease oral evidence was competent to show where, at the time of the execution of the lease, the streets were, and what building was on the corner of these streets then recently erected by the defendant. *Durr v. Chase*, 40.
18. At the trial of an action by a lessee, for a breach by the lessor of the terms of a lease in withholding a portion of the premises alleged to have been included in the lease, evidence that, prior to the execution of the lease, the plaintiff informed the agent of the defendant for what purpose he proposed to use the premises, is inadmissible. *Ibid*.
19. At the trial of an action by a lessee for a breach by the lessor of the terms of a lease, in withholding a portion of the premises alleged to have been included in the lease, evidence of the plaintiff, who had not qualified as an expert, of the fair average rental value of the rooms in that part of the building not occupied by him if he had furnished and occupied them for a lodging house, as well as what the same rooms would have been worth to him for the purpose of a lodging house if he had not paid any larger rent, is inadmissible. *Ibid*.
20. If at the trial of an action for alleged abuse of legal process in the excessive attachment of the real estate of the plaintiff and the stock of goods in his store, pneumonia from which the plaintiff suffered can be in any way shown to be a natural and probable consequence thereof, a point upon which this court expresses no opinion, it cannot be so shown by the testimony of one who has no special knowledge of the subject. *Zinn v. Rice*, 571.
21. On the trial of three complaints for the illegal keeping of intoxicating liquors, for keeping and maintaining a common nuisance consisting of a building used for the illegal sale and illegal keeping of intoxicating liquors, and for an unlawful sale of intoxicating liquors, the defendant, in order to meet the evidence of the government tending to show his proprietorship of the premises in question, put in evidence a lease of the premises from the owner to a third person dated a few days before the date of the alleged offences, and testified that he gave up the premises to such new lessee. The government, for the purpose of showing that the lease was not given in good faith, and that the place was not given up by the defendant to the

new lessee, asked him, on cross-examination, whether on the day the lease was executed he did not state to a certain person that he wanted to have a certain case then pending against him settled, as he had a lot of farming to do, wanted to plant five acres of potatoes, and wanted to be at liberty to do so, and, on his replying in the negative, called in rebuttal the person named in the question to the defendant, who testified that the defendant made such a statement to him. *Held*, that the question to the defendant and the evidence of the witness were competent. *Commonwealth v. Early*, 186.

22. At the trial of an action of trespass involving the determination of the ownership of a strip of land, it appeared that the strip in question lay between two lines, one of which was two rods and the other two and a half rods westerly of the central line of the defendant's railroad, which there ran nearly north and south; that the original location of the railroad at that point was five rods wide; that when the location was filed the owner of land included in the location lying next easterly of the strip in question, the boundary line of which separating it from this strip was two rods westerly from the centre line of the location, was also the owner of four other lots southerly of and adjoining the lot lying next easterly of the strip in question, through which the location ran, leaving him the owner of the portions of those lots lying on each side thereof; that after the location was filed, he filed a petition before the county commissioners asking for an assessment of the damages for the taking of the land, in which he alleged that the land taken "for the building of said railroad and for railroad purposes" along the edge of the first of these lots, and through the other four lots, was a strip "four rods in width or thereabouts"; that upon this petition the county commissioners, as appeared by the record of their proceedings, which was admitted in evidence, awarded damages, describing the land taken as it was described in the petition; that by an agreement between him and the railroad company, which, together with a deed therein referred to, were introduced in evidence, both bearing the same date as the decree of the county commissioners, it appeared that the defendant was to pay to such owner, within three years from that date, the damages awarded by the county commissioners, and was to receive deeds for all of these lots covering the strip four rods wide through them all, these deeds being delivered in escrow with a provision that any deed might be taken by the company on payment of that portion of the money which was mentioned as the price of the land conveyed by it, and that, if the whole amount was not paid within three years, the deeds should be returned to the grantor, and the railroad company should have no right to the land except that derived from its location, and should be liable for the payment of the commissioners' award, that the sum mentioned in the agreement was not paid within the time limited therein, and the deed of the lot next easterly of the land in question which had been delivered in escrow was never delivered to the railroad company, although under the agreement it was to be inferred that the land was afterwards paid for in accordance with the award of the county commissioners; and that this deed described by metes and bounds the strip four rods wide, and to the descrip-

tion were added the words "the same being the track or road-bed of said" railroad company "four rods in width." *Held*, that the facts disclosed by the agreement and deed tended to show that of the estate of such owner the railroad company took and paid for a strip of land only four rods wide next easterly of the land in question and extending southward through the next four lots, and that the remainder of the land included in the original location along that line was abandoned, and that these papers, taken in connection with the record of the county commissioners, were competent as tending to show that the railroad company also abandoned the strip of land in question. *Bicknell v. New York & New England Railroad*, 428.

23. At the trial of a writ of entry to foreclose a mortgage brought by a mortgagee against a mortgagor, in which the defences relied on were adverse possession of the premises maintained for more than twenty years prior to the commencement of the action, and payment or satisfaction of the mortgage debt, it appeared that the mortgage was executed in 1860; that the mortgagee, who was a resident of Rhode Island, died in 1870, and that his will was there admitted to probate in 1871, the demandant being appointed one of the executors; that in March, 1892, the will was admitted to probate in Massachusetts, and the demandant was appointed executor here, and in June, 1892, brought the writ of entry to foreclose the mortgage; and that in 1878 a third person, acting under a power of attorney from the executors appointed in Rhode Island, made an open and peaceable entry upon the mortgaged premises, in the presence of two witnesses, for the purpose of foreclosing the mortgage, and caused a certificate to be made and recorded in accordance with the statute, and on the same occasion had an interview with the widow and daughter of the mortgagor, who were then living on the premises, at which time a lease of the property for one year, running from the executors of the mortgagee to the widow of the mortgagor, signed for the lessee by the hand of her daughter, one of the tenants in the action, was executed, and afterwards held by the executors, and at the same time the widow and daughter of the mortgagor were told that the executors were taking proceedings to foreclose the mortgage. *Held*, that evidence of the action of the executors was competent on the question whether the tenants had been in adverse possession of the property for twenty years prior to the beginning of the action, and on the question whether there should be a presumption of payment of the mortgage from lapse of time. *Held, also*, that declarations and admissions of the widow of the mortgagor, who after his death was an owner of an interest in the mortgaged premises, and continued in the occupation of them until her death, tending to show the nature of her occupation, were competent to be considered in connection with her conduct in remaining there upon the question whether there should be a presumption of payment of the mortgage, and whether her possession was adverse to the mortgagee. *Anthony v. Anthony*, 343.

See ABUSE OF LEGAL PROCESS, 2; ACTION, 2; ASSIGNMENT, 3; AUDITA QUERELA, 1; CASE STATED, 1; CONTRACT, 1, 3; DEPOSITION; DIVORCE, 1; EMPLOYERS' LIABILITY ACT; EQUITY, 8; EXCEPTIONS,

4, 6; FOREIGN LAWS, 1-5; FRAUDS, STATUTE OF, 3; FRAUDULENT REPRESENTATIONS, 1, 7; GAMING, 1, 2; GUARANTY, 5; INSURANCE; LARCENY, 2; LEASE, 5; LICENSE; MASTER AND SERVANT, 12; MECHANIC'S LIEN, 6, 8; VARIANCE; VERDICT, 3; WITNESS.

EXCEPTIONS.

1. The presiding judge is not required by law to allow amendments of the bill of exceptions by the excepting party, but his power so to do is undoubted, and although such amendments cannot be allowed without the consent of the excepting party, they may be allowed with his consent so far as is necessary to make them conformable to the truth and the whole truth with reference to the questions of law raised at the trial, and included in the original bill of exceptions. *Hector v. Boston Electric Light Co.* 558.
 2. It is within the power and discretion of the presiding judge to allow amendments to a bill of exceptions which are made after the time for filing the original bill has expired. *Ibid.*
 3. A point not taken at the trial in the Superior Court on the merits is not open on a bill of exceptions. *Zinn v. Rice*, 571.
 4. An exception to a statement of undisputed evidence in a charge to the jury will not be sustained where the ruling as to its effect does not appear. *Littlehale v. Osgood*, 340.
 5. Where the question whether there is an implied warranty that premises let furnished are in a good sanitary condition does not appear to have been raised at the trial, it cannot be considered on exceptions. *Ibid.*
 6. An exception of the defendant to a refusal of the presiding judge to rule that the action cannot be maintained on a given count of the declaration will not be sustained when the bill of exceptions recites that there was evidence tending to prove that count, and nothing appears to show that there was error in submitting it to the jury. *Holst v. Stewart*, 516.
 7. When parts of a ruling requested were objectionable, but the ruling is not stated in a bill of exceptions to have been refused as a whole for that reason, if a definite request contained in it was correct in law and pertinent to the evidence, and was not in substance given in the charge to the jury, and it is clear that the excepting party was thereby prejudiced and injustice done, a new trial may be ordered. *Bride v. Clark*, 130.
 8. If the bill of exceptions in a criminal case recites that the judge instructed the jury, among other things, that they might take into consideration the fact whether the defendant had opportunity to commit the crime, "and gave full instructions on all other points of the case," the defendant shows no ground of exception to the refusal of the judge, at the close of the charge, to further instruct the jury that, if any one else had opportunity to commit the crime, that fact should be considered by the jury in the defendant's favor. *Commonwealth v. Sullivan*, 59.
- See ARREST, 3; ASSESSOR, 2; EVIDENCE, 5, 15; INTOXICATING LIQUORS, 1; JUDGMENT; WRIT OF ENTRY, 2, 3.

EXECUTION.

The Superior Court has power, where there is a variance between the judgment and the execution issued thereon in an action, which is found to have been caused by a clerical error of the clerk of the court, to allow an amendment, substituting in the execution the name of "A., administrator with the will annexed," for the name "A., special administrator," so as to make the execution accord with the judgment; and it is no objection to the allowance of the amendment that the motion therefor was not made in that action, but in a subsequent action to recover land which was attached in the original action as having been fraudulently conveyed to the present defendant, and upon which the execution was levied, both actions having been brought in the same court for the same county. *Dewey v. Peeler*, 135.

See EQUITY, 4; TROVER.

EXECUTOR.

See DEVISE AND LEGACY, 1; ESTATES OF PERSONS DECEASED, 1, 3-5; EVIDENCE, 23; TAX, 2.

EXPERT.

See EVIDENCE, 14, 19, 20.

FALSE REPRESENTATIONS.

See FRAUDULENT REPRESENTATIONS; TRUST AND TRUSTEE.

FEE.

See SEWER.

FIRES.

The owner of a hotel cannot be said to have violated the provisions of St. 1888, c. 426, § 1, so as to be liable to an action under § 12, for injuries occasioned by his neglect to provide proper and sufficient ways of egress or other means of escape from fire, until after the inspector of buildings has decided what ways of egress or means of escape are in his opinion necessary, and has given notice thereof in writing to the owner, specifying the same, and the owner has neglected or refused to comply with the order of the inspector. *Perry v. Bangs*, 35.

See LEASE, 2.

FORCIBLE ENTRY AND DETAINER.

If a person who purchases an estate at a sale under a power contained in a mortgage, with a provision authorizing the mortgagee to purchase at the

sale, is the agent of the mortgagee, and the conveyance to him from the mortgagee and the reconveyance by him to the mortgagor are simultaneous acts, an action against the mortgagor to recover possession of the estate may be maintained by the mortgagee under the Pub. Sta. c. 175. *North Brookfield Savings Bank v. Flanders*, 335.

See SAVINGS BANK.

FORECLOSURE.

See EVIDENCE, 7, 23; LIMITATIONS, STATUTE OF, 1; MORTGAGE, 1; TRUST AND TRUSTEE.

FOREIGN CORPORATION.

1. If a person, by attachment or otherwise, has obtained a valid lien on the property in this Commonwealth of a foreign corporation, such lien is not dissolved by the filing of a bill or the appointment of a receiver, but must be enforced; but where there is no such lien, the general principle is that the property should be so administered that all claimants should receive their equal ratable shares of the whole property of the corporation. *Buswell v. Order of the Iron Hall*, 224.
2. A fraternal beneficiary association incorporated and having its Supreme Sitting in another State, with local branches in this Commonwealth holding a charter and working under the jurisdiction of the Supreme Sitting, established a benefit fund wherein members, under specified conditions and regulations, might become participants, and from which they might receive indemnity when by reason of disease or accident they became totally disabled from following any vocation. The fund was derived from assessments upon the holders of benefit certificates made by the Supreme Sitting of the Order, from time to time, through the local branches. Eighty per cent of the amount received by each branch on each assessment was sent to the supreme cashier of the Supreme Sitting, while the remaining twenty per cent was set aside and retained by the local branch as a reserve fund, but was the property of the Supreme Sitting, and at all times subject to its control. *Held*, that the legal title to the reserve fund, which was essentially a part of the benefit fund, was in the Supreme Sitting and not in the different local branches, and was held in trust for all the holders of benefit certificates; and that upon the insolvency of the association, and the appointment of a receiver thereof by a court of competent jurisdiction of the State where the association was organized who was authorized to collect all the moneys belonging to the order in the possession of all the branches wherever organized for the purpose of equally and ratably distributing them among the creditors and certificate holders wherever residing, the receiver might maintain a petition, in a proceeding brought in this Commonwealth by a certificate holder for the common benefit of himself and other certificate holders, to obtain for such distribution the funds held by the receiver appointed here, and, after an allowance to the latter for his charges and expenses and the payment of

the expenses of the suit, the balance of the reserve and benefit funds should be transmitted to the foreign receiver, provided that the court by whom he was appointed should distribute the whole fund within its control so that the benefit certificate members of the local branches here should receive the same proportionate dividend as benefit certificate members of branches in other States who should be admitted to share in the fund. *Buswell v. Order of the Iron Hall*, 224.

3. It is doubtful whether an association purporting to be organized under chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, and having its principal place of business in this Commonwealth, the object of whose incorporation is the institution of lodges throughout the State of New Hampshire and elsewhere for friendly co-operation and moral support, for the collection and accumulation of a benefit fund payable to certificate holders according to the terms and conditions of the certificate, and, as incident to the management of such fund, for the purpose of dealing in real and personal estate and of carrying on the business of general stockbrokers, can be called a fraternal benefit corporation within the meaning of St. 1888, c. 429, or whether it was legally established as a corporation under the laws of the State of New Hampshire. If it is not a corporation, it is a voluntary association of individuals doing business in this Commonwealth, under a constitution and by-laws to which all the members have assented, and by which their membership is to be determined, and the members must be regarded either as partners or co-owners of the property, and if the association is not strictly a partnership the property on its dissolution must be distributed among the members in much the same manner as if it were a partnership. *Garham v. Mutual Aid Society*, 357.

4. A corporation purporting to be organized under chapter one hundred and fifty-two of the General Laws of the State of New Hampshire, with its location in Manchester in that State and its principal place of business in this Commonwealth, the object of whose incorporation is the institution of lodges throughout the State of New Hampshire and elsewhere for friendly co-operation and moral support, for the collection and accumulation of a benefit fund payable to certificate holders according to the terms and conditions of the certificate, and, as incident to the management of the fund, for the purpose of dealing in real and personal estate, and of carrying on the business of general stockbrokers, has, it seems, its actual home in this Commonwealth, and its funds held for the benefit of holders of certificates should be distributed here, so far as the court has power to do this; and it is equitable and more nearly according to the analogy of the provisions of St. 1890, c. 321, relating to the insolvency of foreign corporations, that they should be proportionately distributed among the holders of certificates without regard to their place of residence, and that certificate holders and creditors who have valid attachments or have made proof of claims elsewhere should not be allowed to prove their claims unless the attachments are discharged, or the proofs cancelled, or the property attached or against which proofs have been made is delivered to the receiver here. *Ibid.*

See BENEFICIARY ASSOCIATION, 1, 2, RECEIVER, 4.

FOREIGN JUDGMENT.

1. In an action upon a foreign judgment it is proper to inquire into the jurisdiction of the court in which the judgment was rendered to ascertain whether the defendant appeared, and, if not, whether legal service was made upon him. *Rothrock v. Dwelling-House Ins. Co.* 423.
2. An action cannot be maintained in this Commonwealth upon a judgment rendered in Arkansas against an insurance company incorporated here on a policy of insurance issued to a resident of that State, where the company, having no place of business in Arkansas, except as certain persons solicited insurance for it there, had not filed with the auditor of that State, as required by statute, a written stipulation that legal process affecting it served on the auditor should have the same effect as if served personally on it, and where service of process in the action in which the judgment was rendered was made only on the auditor, and not on the company. *Ibid.*

See FOREIGN LAWS, 3.

FOREIGN LAWS.

1. In the absence of anything to show the contrary, there is a presumption that the common law of another State is like that prevailing here; but this presumption does not extend to the statutory law of another State. *Kelley v. Kelley*, 111.
2. Where a question of the law of another State is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at the argument of the case before this court for the purpose of proving the law of such State. *Ibid.*
3. It does not fall within the general jurisdiction of a court of chancery, independently of statutory authority, to annul a marriage for the reason that, when it was contracted, the wife had a former husband living; and there is no presumption that such a court of another State had jurisdiction to entertain a suit of that nature, or in such suit to pass an order for the payment of alimony *pendente lite*, or to enter a final judgment for arrears of alimony, counsel fees, and costs; but the existence of the jurisdiction must be proved at the trial of a suit here to obtain an execution upon the judgment. *Ibid.*
4. A book, offered at the trial of an action as evidence of the law of another State, which does not purport to be published under the authority of the government of that State, nor appear to be commonly admitted and read as evidence in its courts, is rightly excluded. *Bride v. Clark*, 130.
5. If the only evidence of the law of another State consists of certain sections of the statutes of that State, the construction of this evidence is for the court. *Ibid.*
6. Under 1 N. Y. Rev. Sta. (pp. 273, 274), §§ 28, 29, the buying and selling of pools on horse races is illegal in that State; and if such a sale is the

foundation of the consideration of a promissory note made and delivered in this Commonwealth, no action can be maintained here by the payee against the maker of the note. *Bride v. Clark*, 130.

FORFEITURE.

See MORTGAGE, 1.

FRANCHISE.

See EMINENT DOMAIN, 3.

FRAUD.

See COMPOSITION WITH CREDITORS, 2; EQUITY, 4; FRAUDULENT REPRESENTATIONS; PROMISSORY NOTE, 2, 3; TRUST AND TRUSTEE.

FRAUDS, STATUTE OF.

1. The description, in a memorandum of sale given by A. to B. of the property sold, as "my right in B. R.'s (my father) estate," if the only real estate which B. R. owned was his homestead in a certain town, which he devised in equal shares to A. and B., is sufficient, within the statute of frauds, Pub. Sts. c. 78, § 1. *Ryder v. Loomis*, 161.
2. In an action for breach of an agreement to convey land to the plaintiff there was evidence of an oral offer made by the defendant on May 12, 1892, to sell the land to the plaintiff "within a reasonable time." The next day, in response to a telegram of the plaintiff that he had notified F. that "I have taken option from you of N. land," the defendant replied, in writing, on a postal card, "The land is yours if you want it." Two weeks later, on May 25 or 27, in a second interview, the plaintiff testified that the defendant "definitely concluded to sell to me. The transaction was concluded definitely. He said I could have the land for ten thousand dollars, and I agreed to take it then and there." On June 2, the defendant again wrote to the plaintiff, in substance, that he was advised by counsel that as administrator he had no authority to convey and could not give a title; that he ought not to have considered any price under \$11,000, but that he had been over-persuaded and made to say what he should not have said, and concluded, "I do not know what I can say more, but to throw myself upon your generosity." On June 17, he wrote again, saying that he had conveyed the land to a third person, and was very sorry for the whole affair, and threw himself on the generosity of the plaintiff. On July 6, in response to a letter written by the plaintiff's son on his behalf stating briefly the agreement from the plaintiff's point of view, and seeking to obtain from the defendant an admission that such were the facts of the case, the defendant wrote, "In reply to yours of July 2, will say I did say to your father that he could have the refusal of land at N. for \$10,000 for ten days." *Held*, that the plaintiff's

case must rest on the oral contract, which was made at the interview on or about May 25, and that there was nothing in writing sufficient to show that the defendant entered into that contract. *Williams v. Smith*, 248.

3. If, in an action for breach of an agreement to convey land in which the answer sets up the statute of frauds, no one paper alone which is formally signed purports to express the terms of the contract, all the correspondence between the parties must be considered in order to see what the contract actually was as shown by the writing. *Ibid.*
4. If a creditor who has proved his debt, which is evidenced by a promissory note, and received a percentage thereof under composition proceedings in bankruptcy, delivers the note to the debtor as a loan upon his promise to return it, the subsequent return by him of the note does not, it not being so intended, amount to a new promise in writing by the debtor, within Gen. Sts. c. 105, § 3, (Pub. Sts. c. 78, § 3,) which will avoid the defence of a discharge in bankruptcy in an action upon the note. *Jacobs v. Carpenter*, 16.
5. The mere payment by a debtor, who has received a discharge in bankruptcy, of a sum on account of a debt which has been discharged, and which is evidenced by a promissory note, is not sufficient to raise the implication of a promise, within Pub. Sts. c. 78, § 3, such as will avoid the defence of the discharge in an action upon the note. *Ibid.*
6. A debtor, after his discharge in bankruptcy, wrote to his creditor "Enclosed please find our check for" a sum named "as an instalment of a long deferred promise; our regret is that it is not larger, but as opportunity presents itself you may be assured that you will not fail to receive tangible evidence of the purity of our intentions"; and later, "Enclosed please find our bill for" a sum named "receipted, together with our check for" another sum named "to be applied to old matters." *Held*, in an action on the debt, that the letters did not contain a new promise in writing by the debtor, within Pub. Sts. c. 78, § 3, which would avoid the defence of the discharge. *Ibid.*

See WRIT OF ENTRY, 3.

FRAUDULENT CONVEYANCE.

See EQUITY, 4.

FRAUDULENT REPRESENTATIONS.

1. In an action against a lessor, for alleged false representations that a house appurtenant to which was an old well filled with filthy matter was in a good sanitary condition, the burden of proof is on the plaintiff to show that the condition of the well, which was an adequate cause of disease, was the actual cause thereof, and it is not sufficient to show that it might have been the cause, but the fact must be proved, and the jury cannot act on mere conjecture or speculation. *Littlehale v. Osgood*, 340.
2. A false statement as to the frequency of the arrival and departure of railroad trains at different hours of the day at a certain railroad station in

the vicinity of Boston, made as an inducement to purchase property near that station, has such a relation to the value of the property as to be the subject of a fraudulent representation. *Holst v. Stewart*, 516.

3. In an action for false and fraudulent representations the declaration alleged that the defendant, to induce the plaintiff to purchase a farm near a railroad station in the vicinity of Boston, made false and fraudulent representations to him regarding the frequency of the running of trains between that station and Boston at different hours of the day; that the plaintiff believed the representations to be true, and was thereby induced to purchase the farm. *Held*, on demurrer, that the times of the running of railroad trains was not a matter so easily ascertainable, under all circumstances, as never to be the subject of a fraudulent representation. *Ibid*.
4. In an action for false and fraudulent representations the circumstances under which the representations were made need not be set out in the declaration. *Ibid*.
5. In an action for false and fraudulent representations it appeared that the defendant when he made them was acting as agent of the plaintiff. *Held*, that in a relation of confidence the plaintiff would be warranted in relying on the assertions of the defendant, when he would not if the defendant were representing only an adverse interest. *Ibid*.
6. At the trial of an action for false and fraudulent representations it appeared that the plaintiff, who was a native of Sweden, and spoke English imperfectly, took a train in Boston with the defendant to go to N. S. to look at a farm there with a view to purchasing it; that while in the car waiting for the train to start, the defendant, in response to an inquiry of the plaintiff, undertook to find out for him in regard to the running of the trains between Boston and N. S.; that the defendant went out of the car, procured a time table, and, returning, looked at it, and falsely represented that a train left N. S. at 5.50 in the morning; that when he made the statement he professed to be reading from the time table, and after he had finished reading from it he put it in his pocket; that later he looked at it again, and stated falsely that there were many trains from Boston to N. S. in the evening; and that the plaintiff exchanged his property in another place for the farm in N. S., the defendant acting as his broker in effecting the exchange, and receiving a commission from the plaintiff for his services. *Held*, that under these circumstances it could not be said, as matter of law, that the plaintiff was so careless in trusting the defendant that he should be precluded from recovering for the fraud practised upon him in regard to the running of the trains. *Ibid*.
7. In an action of tort for false and fraudulent representations with a count in contract for money had and received, to which is annexed a bill of particulars claiming for cash paid "by mistake and under misapprehension of facts at the time of the conveyance," etc., evidence may be introduced under that count which will warrant a recovery, and in the absence of a motion for further particulars the count will be considered sufficient. *Ibid*.

See TRUST AND TRUSTEE; VERDICT, 3.

GAMING.

1. At the trial of a complaint under the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, for being present in a common gaming-house when gaming implements were found there, it appeared that the building in question was protected with a thick oak door with braas trimmings having on the inside an oak bar fitted into staples attached to the door-case on each side of the door; that officers were unable to gain admittance by knocking, and attempted unsuccessfully to break down the door with a sledge-hammer; that some one inside pushed aside a slide covering a hole in the door and looked out, and after some delay the door was opened, and the defendants were found in a room of the building, walking about; that from this room a stairway enclosed in a solid board partition led to a room above; and that between the ceiling of the lower room and the floor of the upper room were found concealed gaming implements, including cards and a deal box used in playing faro. Access to the place of concealment was obtained by removing the riser of the top step of the stairway, which was fastened by a catch. Some one was heard running up the stairway while the officers were trying to enter the building, and after they had entered one of the defendants came down the stairway. It also appeared that faro is a game played with playing cards for money. *Held*, that there was abundant evidence that the building in question was a common gaming-house. *Commonwealth v. Warren*, 281.
2. Although the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, and the statute in regard to nuisances, Pub. Sts. c. 101, § 6, make it necessary to prove that a building is resorted to for the purpose of gaming, it is unnecessary to prove the offence charged by direct evidence that on numerous occasions persons resorted to the house for this purpose, but the evidence may be circumstantial, or the facts disclosed may be sufficient to indicate that the place was one used as a place of resort for the purpose named. *Ibid*.
3. In the Pub. Sts. c. 99, § 10, as amended by the St. of 1887, c. 448, § 2, authorizing the arrest of "all persons present, whether engaged in playing or not, if the implements of gaming are found in said place," the word "place" refers to the house or building which the warrant authorizes the officers to enter, and is not confined to the room where such persons are found when arrested. *Ibid*.

See FOREIGN LAWS, 6.

GAS.

See CONSTITUTIONAL LAW, 4; CORPORATION; TOWN.

GIFT.

Where the payee of a promissory note handed it to the maker, saying, "I will give you this, — this note, as I have never helped D. [his son, and the maker's husband] hardly any," and the maker took it, folded it up, and

put it in her pocket-book, where it remained for an hour or more, until the payee asked her to let him have it to keep to indorse the interest, and she returned it to him, and continued thereafter to pay interest thereon, the inference is justifiable that both the payee and the maker understood that the handing of the note to the maker was not a full gift; but if the transaction was a completely executed gift, and the new agreement to pay interest was a separate transaction, it is immaterial how much time elapsed between the making of the gift and the new agreement, and this question should be submitted to the jury. *Buswell v. Fuller*, 220.

GOOD WILL.

See EVIDENCE, 6.

GRADE CROSSING.

1. The precise manner in which the separation of the grades of an intersecting highway and railway is to be accomplished under St. 1890, c. 428, is to be determined by the commissioners and the court, and it is unnecessary that a plan or specification showing the nature of the alterations desired should accompany or be set forth in the petition. *Norwood v. New York & New England Railroad*, 259.
2. A petition under St. 1890, c. 428, asking "that an alteration should be made in said crossing, in the approaches thereto, in the location of said public way, and in the grades thereof, so as to avoid a crossing at grade," is broad enough to authorize a change in the place of crossing, if, after the change is made, it remains a crossing of the same street, accommodating substantially the same travel, so that it can fairly be called the same crossing removed a short distance to a new location. *Ibid.*
3. Where two new crossings and two new ways proposed in substitution for one crossing at grade of a railroad and highway are each a considerable distance from the old ones, and the two new ways are each of considerable length, and are more than a fair substitute for the old way, they are more than can be ordered under a statute which, when a crossing is discontinued, authorizes new ways to be built only "in substitution therefor." *Ibid.*
4. An owner of real estate abutting on a street a portion of which is discontinued in proceedings under St. 1890, c. 428, none of whose land is taken, and none of which abuts on the discontinued portion of the street, has no personal or private interest different in kind from that of other abutters on the street, and he is not entitled to appear and be heard as a party to proceedings under that statute. *Ibid.*
5. The appointment by the Superior Court, upon the motion of all the original parties to proceedings under St. 1890, c. 428, for the abolition of a grade crossing, of a person as one of the special commissioners who, prior to such appointment, had been an Assistant Attorney General, and as such had entered an appearance for the Attorney General as the representative of the Commonwealth, which was a party to the proceedings, is not, in the absence of evidence to show interest or prejudice, such an error

as requires the report of the commission to be set aside in behalf of persons interested in the proceedings who were not originally parties. *Norwood v. New York & New England Railroad*, 259.

6. An auditor appointed under the provisions of St. 1890, c. 428, § 7, found that certain sums of money paid by a town for counsel fees, and for extra services of the selectmen in defending and settling claims for damages for land taken by the town for the purpose of abolishing a crossing at grade of a public way therein and a railroad, were just and reasonable. *Held*, that these items were improperly disallowed by the Superior Court. *Boston & Albany Railroad v. Charlton*, 32.

See CONSTITUTIONAL LAW, 3; NEGLIGENCE, 6.

GRAND JURY.

See EVIDENCE, 9.

GUARANTY.

1. Where the plaintiff signed the promissory note of H. as surety, relying upon a promise contained in a letter to him from the defendant saying, "If H. needs more money let him have it, or assist him to get it, and I will see that it is paid," and looked to the defendant solely for reimbursement if called upon to pay the note, he was authorized by the letter in relying upon the defendant as a guarantor. *Bishop v. Eaton*, 496.
2. An offer as a guaranty becomes effective as a contract upon the doing of the act specified in the offer, and the doing of the act constitutes the acceptance of the offer and furnishes the consideration. *Ibid*.
3. Ordinarily there is no occasion to notify a guarantor of the acceptance of an offer of guaranty, for the doing of the act specified in the offer is a sufficient acceptance; but when the guarantor would not know of himself from the nature of the transaction whether the offer had been accepted or not, he is not bound without reasonable notice of the acceptance seasonably given after the performance which constitutes the consideration. *Ibid*.
4. If notice of the act which constitutes an acceptance of an offer of guaranty is necessary, the implication is that it shall be given in a reasonable way, depending upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings in regard to the matter, and if they are so situated that communication by letter is naturally to be expected, the deposit of a letter in the mail is all that is necessary, though the letter may not be received by the guarantor. *Ibid*.
5. A surety upon a promissory note who relies upon the guaranty of a third person for reimbursement is not required, after payment of the note, to attempt to collect the money from the maker, and it is no defence in an action on the guaranty that he did not promptly notify the guarantor of the default of the maker, at least in the absence of evidence that the guarantor was injured by the delay. *Ibid*.

liability if, at the maturity of the note, the time for its payment is extended without his consent, unless he subsequently assents to the extension and ratifies it. *Bishop v. Eaton*, 496.

See CONTRACT, 2.

GUARDIAN AD LITEM.

See HABEAS CORPUS, 2; PROBATE COURT.

GUARDIAN AND WARD.

See LIMITATIONS, STATUTE OF, 3.

HABEAS CORPUS.

1. Where the Commissioners of Public Institutions of the City of Boston have, after a full and fair hearing, denied the petition of the mother of a minor child committed to their custody under the provisions of Pub. Sts. c. 48, and Sts. 1882, c. 181, and 1886, c. 330, for its restoration to her, their action, where no error in law or neglect or unfaithfulness in the discharge of their duty is alleged, will not be reviewed on a writ of habeas corpus. *Wares, petitioner*, 70.
2. Where a person imprisoned, who is a minor or a person of unsound mind, is brought before the court on a writ of habeas corpus issued in his behalf on the petition of a stranger who shows no interest in the controversy, a next friend or guardian *ad litem* may be appointed by the court, and after such appointment the petitioner cannot control the proceedings, and has no right to appeal from the decision of the court. *King's case*, 46.
3. As there are no longer any terms in the Supreme Judicial Court, all proceedings on habeas corpus before a single justice may now be regarded as before a court held by a single justice, and questions of law may be reserved or reported to the full court as in other proceedings before the court held by a single justice. *Ibid.*

HIGHWAY.

1. A petition was brought, under the Pub Sts. c. 52, §§ 15, 16, for a jury to assess damages occasioned to the petitioner's estate by raising the grade of a street, which grade was established in 1874, by the street commissioners of the respondent city, and in that year was built to grade, and the buildings abutting upon it, including the petitioner's premises, were raised to conform to the grade, and the damages caused thereby were either released or paid for. In 1890 the whole of the district, including the street in question, fell away from the grade previously established. *Held*, that, whether the falling away was sudden or gradual, the petitioner had no remedy under the statute. *Garrity v. Boston*, 530.

2. In an action against a city for injuries occasioned to the plaintiff's horse and wagon, very early in the morning, by sinking into a hole in a street, where a trench had been dug for the purpose of laying a drain under a permit from the city, although there is evidence on the part of the city tending to show that the trench was properly filled and left in that condition on the afternoon preceding the accident, the jury will be warranted in finding that, by the use of reasonable care and diligence, the proper officers of the city might have known of the defect in time to remedy it. *Bingham v. Boston*, 3.

See CONSTITUTIONAL LAW, 3; GRADE CROSSING; LAW OF THE ROAD; LICENSE.

HOMESTEAD.

1. A person, having from a time prior to 1840 owned land on which was a single house built for one family and having but one front door, acquired an estate of homestead therein. From 1852 until his death in 1889 he, with his wife, lived in one half of the house, while his son, with his family, lived in the other half, but the cellar, hallways, stairs, some rooms in the second story, and the barn were used by them in common. *Held*, that he had an estate of homestead in the entire estate. *Pratt v. Pratt*, 276.
2. The right of homestead is a freehold estate for the life of the husband, and for such further time after his death as his widow shall continue to occupy the homestead, which cannot be affected by the will of the husband. *Ibid*.
3. A widow of a person having an estate of homestead, who, on the day after the funeral of her husband, being of advanced age and ill, unwillingly leaves the homestead estate, and lives for two months with neighbors, but who leaves various articles of furniture and household goods on the premises, intending to return, although in fact she never does, is not thereby deprived of her right to have an estate of homestead set off to her. *Ibid*.

See FRAUDS, STATUTE OF, 1.

HOUSE OF CORRECTION.

A sentence to confinement in the house of correction for the term of two years of a person convicted, under Pub. Sts. c. 205, § 4, of endeavoring to "procure another person to commit perjury, though no perjury is committed," the punishment prescribed for which is imprisonment in the state prison not exceeding five years, or in the jail not exceeding one year, is not erroneous, under c. 215, §§ 19, 20; and, although a failure to include in the sentence solitary imprisonment, as prescribed by c. 215, § 23, is error, if such error is not insisted upon the judgment will be affirmed. *Lane v. Commonwealth*, 120.

HUSBAND AND WIFE.

See DEVISE AND LEGACY, 4-6; DIVORCE; DOMICIL; EQUITY, 2, 3; FOREIGN LAWS, 3; HOMESTEAD.

- See CONTRACT, 2.

See HABEAS CORPUS, 2; PROBATE COURT.

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2. Where a person imprisoned, who is a minor or a person of unsound mind, is brought before the court on a writ of habeas corpus issued in his behalf on the petition of a stranger who shows no interest in the controversy, a next friend or guardian *ad litem* may be appointed by the court, and after such appointment the petitioner cannot control the proceedings, and has no right to appeal from the decision of the court. *King's case*, 46.
3. As there are no longer any terms in the Supreme Judicial Court, all proceedings on habeas corpus before a single justice may now be regarded as before a court held by a single justice, and questions of law may be reserved or reported to the full court as in other proceedings before the court held by a single justice. *Ibid.*

1. A petition was brought, under the Pub Sts. c. 58, § 1, for a jury to assess damages occasioned to the petitioner's property by raising the grade of a street, which grade was established in 1890 by the street commissioners of the respondent city, and in that year the petitioner's buildings abutting upon it, including the basement, were altered to conform to the grade, and the damages were assessed and paid for. In 1890 the whole of the street in question, fell away from the grade, and the petitioner sought to know whether the falling away was a public nuisance, and if so, what remedy under the statute. (C)

2. In an action against a city for injuries occasioned to the plaintiff's horse and wagon, very early in the morning, by sinking into a hole in a street, where a trench had been dug for the purpose of laying a drain under a permit from the city, although there is evidence on the part of the city tending to show that the trench was properly filled and left in that condition on the afternoon preceding the accident, the jury will be warranted in finding that, by the use of reasonable care and diligence, the proper officers of the city might have known of the defect in time to remedy it. *Bingham v. Boston*, 3.

See CONSTITUTIONAL LAW, 3; GRADE CROSSING; LAW OF THE ROAD; LICENSE.

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2. The right of homestead is a freehold estate for the life of the person, and for such further time after his death as his widow shall choose to occupy the homestead, which cannot be affected by the will of the husband. *Ibid.*
3. A widow of a person having an estate of homestead who, after the funeral of her husband, being of age and sane mind, leaves the homestead estate, and lives for two years with a person who leaves various articles of furniture and other personal effects, intending to return, although in fact she never returns, is deprived of her right to have an estate of homestead in the same. *See FRAUDS, STATUTE OF.*

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ILLEGALITY.

See EVIDENCE, 4; FOREIGN LAWS, 6; FRAUDULENT REPRESENTATIONS.

IMPLIED CONTRACT.

See PARTY WALL, 1.

IMPRISONMENT.

See HOUSE OF CORRECTION.

INCOME.

See DEVISE AND LEGACY, 6; ESTATES OF PERSONS DECEASED, 3-5.

INDEMNITY.

See ACTION, 3, 6.

INDENTURE.

See LEASE, 3.

INDICTMENT.

See LARCENY.

INFANT.

See MASTER AND SERVANT, 9.

INJUNCTION.

See EMINENT DOMAIN, 3; EQUITY, 7.

INSOLVENCY.

See ASSIGNMENT, 4; COMPOSITION WITH CREDITORS: EQUITY, 4; FOREIGN CORPORATION; FRAUDS, STATUTE OF, 4-6; RECEIVER; SUPERIOR COURT, 2.

INSPECTION LAWS.

See FIRES.

INSTRUCTIONS.

See ABUSE OF LEGAL PROCESS; ARREST, 3; EVIDENCE, 5; EXCEPTIONS, 4, 6-8; LICENSE; STREET RAILWAY, 2; TRIAL; VERDICT, 3; WRIT OF ENTRY, 2-4.

INSURANCE.

An application for insurance against an employer's liability for personal injuries to his employees was for a "policy to be based upon the following statement of facts which are to be considered as warranties," among which were the following: "The employer's address is 240 Ruggles St., Boston. The employer's works are situated at (state all) as above and where cutting ice. The trade or business is ice-dealers. The operations carried on by the work-people are cutting and handling ice. The machinery in use is such as is necessary in cutting ice. There is no information tending to vary the risk, except as herein stated — No. The insurance is to cover the expenditure in wages of five thousand dollars." Upon this application a policy was issued in consideration of a premium which was therein stated to be "based upon the estimated yearly pay-roll of the employer, amounting to \$5,000," and which also recited that the statements in the application "the employer warrants to be true, and agrees shall be incorporated herein"; and further stated that "the sums paid to the employer shall be for personal injury, within the meaning of this policy, caused to any employee in his service while engaged in the employer's work in any of the occupations or at any of the places mentioned in the schedule hereto," which contained the following: "Description of occupation of employees: All operations connected with the business of ice-dealers." "Places at which employees to whom wages are paid are employed: At 240 Ruggles Street, Boston, Massachusetts, and elsewhere in the service of the employer." *Held*, that injuries caused to employees of the assured by the fall of an ice-house, while in process of construction by him, not in the season for cutting ice, were not within the policy. *Held*, also, that evidence that it was customary for persons in the ice business to erect their own ice-houses was immaterial. *People's Ice Co. v. Employers' Liability Assurance Co.* 122.

See ACCIDENT INSURANCE; ASSIGNMENT, 1-3.

INTEREST.

See EQUITY, 13; GIFT; MORTGAGE, 2; PRINCIPAL AND AGENT.

INTOXICATING LIQUORS.

1. At the trial of a complaint for keeping and maintaining a liquor nuisance, the defendant has no ground of exception to the refusal of the judge to allow samples of beer taken from the defendant's premises to be tasted by the jury, for the purpose of determining whether it is or is not intoxicating. *Commonwealth v. Brelsford*, 61.
2. At the trial of a complaint for unlawfully keeping intoxicating liquors with intent unlawfully to sell the same, the uncontradicted evidence for the government showed that the constable and selectmen, who were young men of the town in which the defendant's premises were situated, visited the premises, which consisted of a dwelling-house, shed, and barn, very

early in the morning, with a warrant to search the premises for intoxicating liquors; that the defendant, after their denial of his request to wait a few minutes, let them into the house, remarking that "he thought the boys would give him the same chance that the other selectmen had given him"; that they found in a small room with a sink in it three barrels containing a large number of bottles filled with lager beer, also in the same room upon tin waiters on a table several glasses discolored and smelling of whiskey, tunnels, measures, and mugs, also in a closet several flasks filled with rum, and a large quantity of empty bottles and flasks in the house and shed, besides wine glasses and a wire drainer; that in the cellarway leading from the barn to the barn cellar was a whiskey barrel, with a capacity of thirty to forty gallons, set upon blocks, and having a faucet, and containing about two gallons of whiskey; and that the defendant's family consisted of himself, his wife, and three children. *Held*, that the evidence was sufficient to warrant a verdict of guilty. *Commonwealth v. McManus*, 64.

See COMPLAINT; CONSTITUTIONAL LAW, 2; EVIDENCE, 2-4, 21.

JUDGE.

See DIVORCE, 1, 2, EQUITY, 9-11; LEASE, 5; LICENSE; MECHANIC'S LIEN, 8; VERDICT, 1-3.

JUDGMENT.

At the first trial of an action in the Superior Court the presiding judge ruled that the action could not be maintained on one of the counts of the declaration, and submitted the case to the jury upon another count, upon which a verdict was returned for the plaintiff, and the defendant alleged exceptions, which were here sustained. To the ruling on the first count the plaintiff alleged exceptions, which were allowed, but were never entered in this court. On motion of the defendant, after the former decision in this court, and after the plaintiff had amended his pleadings, the Superior Court dismissed the plaintiff's exceptions, but refused to affirm the ruling upon the defective count. *Held*, that the refusal was right, as there was no judgment of the Superior Court to affirm. *Holst v. Stewart*, 516.

See AUDITA QUERELA, 1; EQUITY, 4, 6; EXECUTION; FOREIGN JUDGMENT; HOUSE OF CORRECTION; REVIEW; SUPERIOR COURT; TROVER; VERDICT, 4.

JURISDICTION.

See DIVORCE, 3; FOREIGN JUDGMENT; FOREIGN LAWS; POOR DEBTOR; RECEIVER 1, 4.

JURY.

See ACCIDENT INSURANCE, 2; CONSTITUTIONAL LAW, 6; DOG, 1; EMPLOYERS' LIABILITY ACT, 2; EXCEPTIONS, 4, 6-8; FRAUDULENT REPRESENTATIONS, 1; GIFT; HIGHWAY, 2; INTOXICATING LIQUORS; MALICIOUS PROSECUTION; NEGLIGENCE, 4, 6; RAILROAD, 4; TRIAL; VERDICT.

LACHES.

See EQUITY, 5.

LANDLORD AND TENANT.

A landlord is not liable for a defect in a drain, which, in the course of a tenancy at will, is discovered by him, nor for failing to disclose it to the tenant, if the defect is unknown to the latter. *Bertie v. Flagg*, 504.

See EXCEPTIONS, 5 ; FRAUDULENT REPRESENTATION, 1 ; LEASE.

LARCENY.

1. An indictment for larceny alleged that the owner of the stolen property was Preston O. S., and there was evidence that he was as well known by that name as by the name of O. Preston S. *Held*, that it could not be said, as matter of law, that there was a variance. *Commonwealth v. Williams*, 442.
2. At the trial of an indictment for larceny the owner of the stolen property testified that on September 12, while in a railroad station in Boston, he was jostled or pushed against by some unknown person, and immediately thereafter discovered that his watch, chain, and charm were gone, and that a few days later he went to a collateral loan office in Boston and found the watch he had lost, which a clerk in the office testified that the defendant had pawned there on September 14. *Held*, that there was evidence that the watch, chain, and charm had been stolen, and that the defendant was the thief. *Ibid*.

LAW AND FACT.

See ACCIDENT INSURANCE, 2 ; DOG, 1 ; EMPLOYERS' LIABILITY ACT, 2 ; EQUITY, 7 ; FOREIGN LAWS, 5 ; FRAUDULENT REPRESENTATIONS, 6 ; GIFT ; HIGHWAY, 2 ; LEASE, 5 ; MECHANIC'S LIEN, 1 ; NEGLIGENCE, 4, 6 ; RAILROAD, 4.

LAW OF THE ROAD.

The act of driving on the left of the centre of a road sixty feet wide is not of itself negligence, nor does it tend to show negligence or a violation of the law of the road on the part of the driver as against another person crossing the road on foot, who is accidentally injured by him. *Meservley v. Lockett*, 332.

LEASE.

1. A clause in a lease reserving to the lessor the right to sell, and providing that any of the demised land sold during the term should cease to be a part of the demised premises, is valid. *Shaw v. Appleton*, 313.

2. A lease of a building contained the following clause: "Provided always, that in case the premises or any part thereof shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that they shall be thereby rendered unfit for use and habitation, then and in such case the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation, and in case of such destruction or damage, or a like destruction or damage by any taking or appropriation by public authority for public uses, then the lessor, his heirs or assigns, may terminate this lease." *Held*, in an action for an eviction of the lessee by the lessor, that the fact that the building was destroyed or damaged by fire so that it was thereby rendered unfit for use and habitation was a defence. *Hunnewell v. Bangs*, 132.

3. An indenture of lease purported to be between the plaintiff as lessor, and four defendants, copartners, as lessees. It was signed and sealed by the plaintiff and by two of the defendants. The other two defendants, being out of the country at the time of the execution of the indenture, did not sign it, although two spaces were left for their signatures with seals affixed, it being apparently the intention that all the defendants should sign and seal the indenture. One copy of it thus executed was delivered by the plaintiff for all the lessees to the two defendants who had signed it, and they delivered the other copy to the plaintiff. The firm entered and occupied the premises for five months, and then gave notice that they should quit and deliver them up. *Held*, that though an action could not be maintained on the covenants of the lease against the four defendants because they did not execute it, yet the indenture took effect as a deed poll, and a promise would be implied on the part of the defendants to pay rent according to its stipulations. *Burkhardt v. Yates*, 591.

4. A lease recited that the lessor let "all the brick building recently erected by me on the northerly corner of S., P., and S. M. Streets in the said B., with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same." *Held*, that the fact that the corner building, which had been originally two buildings and had been converted into one by the removal of the partition wall, was originally designed by the defendant for three flats, but that prior to the execution of the lease, at the request of the plaintiff, it had been changed into lodgings, while the adjoining building on P. Street, which was separated from the corner building by a solid brick partition wall with no opening of any kind between the buildings, contained, above the store on the first floor, three suites of rooms adapted for housekeeping, warranted the finding that the lease did not include the latter building. *Durr v. Chase*, 40.

5. In an action by a lessee against his lessor for a breach of the terms of a lease which recited that the lessor let "all the brick building recently erected by me on the northerly corner of S., P., and S. M. Streets in the said B., with the exception of the stores on the first floor of the said building together with the cellar under and belonging to the same," the

plaintiff requested rulings, in substance, that the word "building" meant structure, and applied to and included all that structure erected by the defendant just prior to the date of the lease "on the northerly corner of S., P., and S. M. Streets in the said B." under one roof; that the word "building" could be so construed as to include one or more tenements in the same structure, although the different tenements therein might be separated and divided from the other parts by a partition wall; that the words of the lease referred to the entire structure owned by the defendant and recently erected by him on that corner, except such portions of the same as were specifically excepted from the operation of the lease, without regard to the manner in which it was partitioned or divided. The judge declined so to rule. *Held*, that the requests related to the meaning of the description of the premises in the lease as applied to the building and land, and could not be given as pure matters of law, independently of any evidence relating to the building on the corner of the streets mentioned, and that the plaintiff had no ground of exception. *Durr v. Chase*, 40.

See EVIDENCE, 17-19, 21, 23; SPECIFIC PERFORMANCE, 1.

LEGACY.

See DEVISE AND LEGACY.

LEGISLATURE.

See CONSTITUTIONAL LAW; RAILROAD, 2, 3.

LICENSE.

In an action for an alleged trespass in building a spur track of the defendant's railroad over a private way which was on the plaintiff's land, there was evidence tending to show an implied license by the plaintiff for the continuance of the track on his land for several years prior to action brought; but the existence of such license was in dispute. *Held*, that such license might be implied from facts which happened not only before action brought, but also, in the discretion of the presiding justice, from facts occurring afterward, as showing a purpose substantially continuous, though interrupted a short time by the single act of bringing the action. *Held*, also, that evidence of the consent of the selectmen of the town in which the track was located to lay and operate the railroad over the private way and across a public street, which was probably introduced for the purpose of showing a right to cross the street, whether competent or not, became immaterial under the instructions of the judge that the plaintiff had shown that the track was on his land, and that this established his right to recover unless the defendant showed that the plaintiff licensed it to go upon his land, and to remain there. *Keane v. Old Colony Railroad*, 203.

See NEGLIGENCE, 2, 3.

LIMITATIONS, STATUTE OF.

1. The statute of limitations is not a bar to a writ of entry to foreclose a mortgage brought by a mortgagee against a mortgagor, unless it appears that the mortgagee was disseised by the mortgagor twenty years or more before the action was brought. *Anthony v. Anthony*, 343.
2. A breach of a condition of the bond of a trustee to "manage and dispose of all such estate, and faithfully discharge his trust in relation thereto, according to law and to the will of said testator," is distinct from a breach of a condition requiring that the trustee shall "at the expiration of his trust settle his account, . . . and pay over and deliver all the estate remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto"; and though an action against the administrator of a surety on the bond for a breach in the lifetime of the surety of the first condition would, under the provisions of Pub. Sts. c 136, § 9, be barred at the expiration of two years from the appointment of such administrator, yet an action for a breach of the second condition, occurring after the death of the surety and more than two years after the appointment of his administrator, is not so barred. *McKim v. Glover*, 418.
3. A., who in 1882 was appointed guardian of F. and continued as such until his death in 1888, sold, under license of Probate Court, certain premises in 1883 to N., and N. gave A. in payment two promissory notes. The sale being void, no conveyance was made, and seven months later A. legally sold the premises again to N. No new notes were given, nor any payments made, nor any understanding had as to payment. In December, 1883, A. executed a deed to N., which was not delivered until after suit brought. Save as may hereinafter appear no payments were ever received from N. on account of the notes which remained in A.'s possession until February, 1891, and during such possession no indorsements were made thereon, and except as hereinafter stated no payments were applied by A. or the plaintiff, P., to the account against N. A. sued N. upon the notes and an account annexed, the writ being dated July 20, 1890. In February, 1891, A. indorsed the notes to P., the administrator of F., and P. sued out his writ in the present action, dated February 16, 1891, against N., who set up among other defences the statute of limitations. No payments upon the notes or account were ever made by N. to P., except as may be inferred from the facts herein referred to. Before the first sale A. desired N. to purchase the premises and take care of his ward, F., agreeing that charges, etc. should go towards the price to be paid by N. for the premises, but no understanding was had after the first or second sale except as it might be inferred to continue. N. took possession, claiming to be owner, and took care of F. until his death. No accounting was ever had with A., but a certain amount was expended by N., as appeared in a suit by N. against A. The last named credited himself in his account as

guardian with a portion of the sum due N. under the arrangement. The judge, who was to draw from the agreed facts any inferences of fact which might legitimately be drawn therefrom, found for the plaintiff. *Held*, that the judge might well find that the defendant agreed to treat the sum which should reasonably become due to him for care and maintenance before he should pay for the land as a payment toward the price of the land, and he might give credit accordingly upon the plaintiff's claim, and thus avoid the defence of the statute of limitations. *Peabody v. North*, 525.

See DOWER; EQUITY 5; EVIDENCE, 23.

LOAN.

A person who lends a horse to another without more does not authorize the borrower to make him answerable for its keep or improvement. *Cahill v. Hall*, 512.

MAIL.

See GUARANTY, 4.

MAINTENANCE.

See CONTRACT, 1.

MALICE.

See ABUSE OF LEGAL PROCESS, 1.

MALICIOUS PROSECUTION.

In an action for malicious prosecution on a criminal charge, it is not proper for the defendant to argue to the jury as to the effect of the plaintiff's motion to dismiss the complaint against him in the Municipal Court. *Wheeler v. Hanson*, 370.

See EVIDENCE, 9-12.

MARRIAGE.

See DIVORCE; FOREIGN LAWS, 3.

MASTER AND SERVANT.

1. When a person enters the service of another, he impliedly agrees to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used; and it is immaterial whether he examined the machinery before making his contract or not. *Rooney v. Sewall & Day Cordage Co.* 153.
2. If the proprietor of a factory has in use a projecting set screw for holding the collar on a shaft upon which is a pulley, although there is a safer kind

of set screw in common use, he owes no duty to a person entering his employ to box the pulley or shaft, or to change the set screw for a safer one. *Rooney v. Sewall & Day Cordage Co.* 153.

3. A person who was over forty years old and had had considerable experience was employed in a factory to haul piles of soft, loosely coiled hemp along the floor through a narrow space between a machine and rows of this hemp. The machine was all boxed in except the end of the shaft and two pulleys thereon projecting from one side. One of the pulleys was fixed tight to the shaft, and the other was loose and held in place by a collar flush with the end of the shaft, and fastened by a set screw. The screw and shaft stood about three and a half feet from the floor, and were left exposed. The collar and end of the shaft were round and smooth, but the set screw had a sharp-cornered square head, and stood out perpendicularly from the collar about an inch. He did not know of the set screw, which could not be seen when the shaft was revolving, but was plainly visible when the shaft was at rest; but he was well aware of the danger from the moving pulleys and shaft. While passing the machine in performing his work, he came in contact with it and was injured. *Held*, that he could not maintain an action against his employer for the injury. *Ibid.*
4. A master is not bound to cover the gearing upon a machine which is in plain sight, and is not liable to an action by a servant injured thereby merely for neglecting so to do. *McGuerty v. Hale*, 51.
5. If a room in a factory is a suitable place for a certain machine and the work which is done upon it, the fact that the foreman of the room, on a particular occasion, did not lower the windows and ventilate the room, as he had been instructed by his master to do when the machine was being run, does not render the master liable to an action by a servant who is injured upon the machine while affected by dizziness caused by the room not being ventilated. *Ibid.*
6. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his arm caught in a machine upon which he was working, the declaration alleged that the defendant neglected to furnish competent fellow workmen. The plaintiff's evidence showed that E., a fellow workman, was directed by the foreman to start the machine that E. failed to do so, and the foreman started it and cautioned the plaintiff to look out for the end of the machine, on which were two cog-wheels that shortly afterwards some wedges on that end became loose; and the plaintiff, without being told to do so by the foreman, reached over to fix them, and his arm was caught in the wheels and injured. *Held*, that it did not appear that E.'s incompetency to do the work which the foreman set him to do, if he was incompetent, was in any way the cause of the plaintiff's injury. *Ibid.*
7. A person had been employed for four or five weeks in the basement of a factory in the floor of which at one end was an open well four or five feet across and two or three feet deep, filled with water to within a few inches of the surface, and used for the purpose of catching the drippings of water formed by the condensation of steam in the engine which stood

near. He was aware of the existence of the well, but was ignorant of its uses. In the course of his employment he had occasion to go to a barrel standing near the well to procure washers for his machine, and on one such occasion, while stooping to pick up a washer which had fallen to the floor at the side of the barrel from which it had been taken, he slipped and fell so that his legs went into the water in the well and were scalded. *Held*, that it was an injury of which he assumed the risk, and that he could not maintain an action therefor. *Held, also*, that it was immaterial that he did not know the precise extent or character of the injury which he would sustain if he fell into the well. *Feely v. Pearson Cordage Co.* 426.

8. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his fingers cut off by a circular saw upon which he was put to work by the defendant's foreman, it appeared that the plaintiff was hired by the defendant as a common laborer; that the defendant was not present when the plaintiff was put to work on the saw; that on the morning of that day the plaintiff had asked the foreman for permission to saw up some lumber on another saw, and had been refused; and that before that day the plaintiff had worked upon a circular saw six or seven times, three of which were upon the saw which injured him. *Held*, that if, under these circumstances, it was negligent for the foreman to send the plaintiff to work upon the saw, the negligence was that of a fellow workman; and that the action could not be maintained. *O'Brien v. Rideout*, 170.
9. The plaintiff, a boy eighteen years of age, while in the employ of the defendant, was injured by reason of his hand being caught in the gearing of a spinning machine called a mule. He was, so far as appeared, a person of ordinary intelligence, who had attended the high school and had for a considerable time before the accident worked on spinning machines. Where the plaintiff worked there were two mules about thirty or thirty-five feet long standing back to back with an alley-way two and a half feet wide between them. In the centre of each mule was a gearing which operated the front part of the mule, called the carriage, and did the spinning. This was protected by a framework consisting of uprights and an arm which prevented the gearing from being seen. While the plaintiff was passing through the alley-way with one hand in front of him and the other behind him, a way in which he considered it safe and proper to carry his hands, he heard an outcry, turned quickly around, and dropped one of his hands, which was caught in the gearing. There was apparently no occasion for his going into the alley-way, for he testified that the work which he went in there to perform could be done from the front if the machine was stopped, but that he desired to save time by not stopping the machine, so as to make more money. *Held*, that assuming that the plaintiff was properly in the alley-way, and in the exercise of due care, there was no evidence of negligence on the part of the defendant, and that the plaintiff was not entitled to recover. *Cheney v. Middlesex Co.* 296.
10. A person, while employed in helping to unload stones raised from a wagon and swung into place by a hand derrick, was injured by a stone

falling upon his foot. His work was to guide them by a tag-rope, provided for that purpose, and which was long enough to enable him to work in safety. He knew that there was danger that the chain by which a stone was suspended from the derrick might break and the stone fall. There was an open space three feet wide between the line of the stone which fell and a pile of stones on which it was to be put, and, in passing from one place to another in order to guide a stone, he so walked in this open space as to bring his foot directly under the stone, when the chain broke and the stone fell. He might have gone another way by stooping down or crawling under a wagon and passing his rope around a tree, in which case he would not have been exposed to injury by the fall of the stone, and he might have traversed the open space without putting his foot under the stone. He was an experienced hand, had no occasion for haste, and had full control of his own movements and the methods in which he did his work. *Held*, in an action against his employer for the injury, that he voluntarily assumed a risk which was obvious, and his act was careless; and that the action could not be maintained. *Kilroy v. Foss*, 138.

11. The owners of a coasting vessel are not liable for injuries occasioned to a seaman on board the vessel while in port, and in command of the mate, through the breaking of a triangle, on which the seaman was sitting and scraping the mast, where they have furnished proper materials for the construction of the triangle and the injury is caused by the negligence of the mate in constructing it and in ordering the seaman to use it. *Kalleck v. Deering*, 469.
12. The plaintiff, a locomotive engineer, was injured while on duty by being carried against a wooden post standing four feet from the track and two feet from the tender beam where he was at the time. The post had been put up about a week before the accident as a temporary support to a bridge, and the plaintiff, who was an experienced engineer, had passed it daily, but did not know that it was there. *Held*, that the plaintiff took the risk of the injury, and that the defendant was not liable. *Held, also*, that a rule of the defendant forbidding the piling of obstructions within six feet of the track, would, if proved, be immaterial. *Thain v. Old Colony Railroad*, 353.
13. In an action against a railroad corporation for personal injuries occasioned to A., who was in the defendant's employ as a track repairer, the plaintiff's evidence tended to show that A. and three other track repairers, one of whom acted as foreman, were sent to do work on the tracks, taking with them a small platform car provided with handles at each corner for lifting or pushing it, on which to carry their tools; that, as they were proceeding on their way, all being engaged in pushing the car, a "wild" engine, so called, running outside of any schedule time, and of which the men had had no notice, came around a curve in the railroad behind them about two hundred and twenty-five feet away; that, owing to the curve, the engine could not have been seen by the men any sooner, although the foreman kept constant watch for any train approaching in either direction; that they heard no whistle, or bell, or other warning, until the engine was within sixty feet of them, when two short whistles were given; that as

soon as the engine was discovered the men made a motion to lift the car off the track, but the foreman told them not to do so but to give the car a push and get out of the way; and that thereupon all the men gave the car a hard push, and the other men jumped to one side and were not harmed, but A., whose movements were not observed by the others, was struck by the engine and injured. It appeared in evidence that it was a part of the duty of trackmen to look out for "wild" engines; and that they had no other means of protection except to take care of themselves. One of the defendant's rules provided that "wild trains . . . must run cautiously around curves and over grade crossings, looking out for trackmen." *Held*, that the rule had reference to the safety of the train, and not of the trackmen; that the court could not say that A. was subjected to any danger beyond that of which he took the risk; and that the action could not be maintained. *Sullivan v. Fitchburg Railroad*, 125.

See ACTION, 7; CITY; EMPLOYERS' LIABILITY ACT; EVIDENCE, 1, 14-16; INSURANCE; NEGLIGENCE, 1-5, 8, 9; WARRANTY.

MECHANIC'S LIEN.

1. It cannot be said, as matter of law, that work done by a mechanic under a contract substantially performed at an earlier date is only colorable because it is trifling in amount and done with the ulterior purpose of saving his lien. *Monaghan v. Putney*, 338.
2. If a petition alleges that work for which a mechanic's lien is claimed was done under a contract with E., and that the owner of the land is A., and contains no allegation that E. was acting for A. in making the contract, or that he had any authority under which a lien could be created, the petition is defective; but if, on the case being tried as if the petition had been in proper form, it is proved that when the contract was made one M. owned the property and that E. was authorized by him to make the contract, the petitioner may amend his petition, and make the necessary allegations in accordance with the facts, on such terms as the Superior Court may prescribe, and the lien may then be established in accordance with the findings of the justice who heard the case. *Batchelder v. Hutchinson*, 462.
3. The word "contract," in Pub. Sts. c. 191, § 5, where it is provided that "the lien shall not avail or be of force against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed," includes not only formal bilateral contracts, oral or written, but also contracts created by an agreement on one side and action under it on the other side, such as to bring the parties into a contractual relation before the mortgage is recorded; and when a contract exists, the lien for all work done under it relates back to the time when the contract first became binding, and the making of a mortgage after an agreement has become binding as a contract does not affect the right to have a lien for work afterward done under the contract; but if the arrangement is binding only from day to day, and the petitioner ceases to work for two months,

during which the mortgage is made and recorded, and he resumes work in the following month under an arrangement similar to the former one, he has a lien which cannot be enforced against the mortgagee, but only against the owner subject to the rights of the mortgagee. *Butchelder v. Hutchinson*, 462.

4. The objection that a certificate, filed under Pub. Sts. c. 191, is insufficient, is, so far as the interest of the mortgagee is concerned, rendered immaterial by the fact that no lien can be enforced against him for other reasons; but the imperfections will not defeat the claim of the petitioner against the owner, as provided in § 8 of that chapter. *Ibid.*
5. By Pub. Sts. c. 191, § 6, the statement filed in the registry may be subscribed and sworn to by some one in behalf of the claimant as well as by the claimant himself, and a ratification of such a signing is equivalent to an original authority. *Ibid.*
6. On the trial of a petition to establish a mechanic's lien under Pub. Sts. c. 191, evidence that a mortgage claimed to have preference to the lien under § 5 of that chapter was given to secure the payment of money used in paying previously existing mortgages is rightly excluded, as the mortgagee in taking his mortgage acquires no rights under previous mortgages subsequently discharged. *Ibid.*
7. At the trial of a petition to establish a mechanic's lien under Pub. Sts. c. 191, findings in regard to the proper application of payments by the petitioner, first to the materials furnished, and afterwards to the labor, will not be disturbed by this court, if warranted by the evidence. *Ibid.*
8. At the trial of a petition to establish a mechanic's lien, the respondent contended that no lien could be established because a portion of the building extended over the line of the land described in the petition upon land of an adjoining owner. The judge found the value of the work done by the petitioner upon the extension of the building over the line, and upon that part standing on the land described in the petition. The dimensions of the building were before the court, and an estimate was made by an expert witness who knew all the facts. It also appeared that there was conflicting evidence as to the mason work done upon each of the parts of the building, the particulars of which were not reported. *Held*, that it was fair to infer that these particulars may have been of assistance to the judge in applying the other evidence, and that it could not be said that there was no evidence to warrant the finding that the lien should be sustained for the work done upon that part of the building standing on the land described in the petition. *Ibid.*

METROPOLITAN SEWERAGE COMMISSION.

See SEWER.

MISTAKE.

See WITNESS, 2.

MONEY HAD AND RECEIVED.

See FRAUDULENT REPRESENTATIONS, 7.

MONEY PAID.

See EVIDENCE, 8.

MORTGAGE.

1. A purchaser at a sale by auction who has made a deposit of money under an agreement that it shall be forfeited to the use of the seller if he fails to comply with the terms of the sale, cannot recover back the deposit; and the fact that the sale was made by the defendant as mortgagee does not give the plaintiff any additional rights, considering him simply as a purchaser; nor does the fact that he participated in the scheme of the agent of the owner of the equity to delay the foreclosure of the mortgage by pretending to buy the property give him any better standing in court. *Donahue v. Parkman*, 412.
2. Negligence is not imputable to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he receives interest from a third person who offers to see that he receives his interest, or because he does not demand payment at the maturity of the mortgage. *Mulcahy v. Fenwick*, 164.
3. If a mortgage and note secured thereby, given by A. to B., are assigned by B. to C. for value, before maturity and without notice of any failure of consideration, and A., in ignorance of such assignment, makes payments on account of principal and interest to B., who is not the financial agent of C., and who is not asked to and does not produce the note and indorse such payments thereon, but gives receipts therefor, A. in making those payments acts at his own peril, and, not having paid to the owner or the owner's agent must be held to have acted in his own wrong. *Biggerstaff v. Marston*, 101.
4. It is not the duty of the purchaser of a mortgage and note secured thereby, before maturity, to notify the mortgagor of his purchase; but it is the duty of the mortgagor, if he proposes to pay the debt before maturity, to require the actual production of the note, when making such payment to the original mortgagee. *Ibid.*
5. The assignee of a mortgage and note secured thereby, before maturity, by allowing his assignor, the original mortgagee, as his undisclosed agent, to receive payments of interest accruing before the maturity of the note, does not, as matter of law, justify the mortgagor in believing that the assignor has authority to receive the principal before it becomes due. *Ibid.*
6. If the assignee of a mortgage given to secure a negotiable promissory note not matured gives the mortgagor no notice of the assignment, the latter is not entitled to continue to treat the mortgagee as owner simply because he believes him to be such. *Ibid.*

7. A. gave a mortgage of land to B., and, before that matured, gave a second mortgage to B. for a sum including that due on the first mortgage and in satisfaction of it. B. retained in his hands the first mortgage, and afterwards assigned it and indorsed the note secured thereby to C. for value before maturity, and without notice, and on the same day sold the second mortgage to D. *Held*, that D. could not maintain a bill in equity for the cancellation of the first mortgage, but was limited to the right to redeem the land from that mortgage. *Watson v. Wyman*, 96.

See EQUITY, 12, 13; EVIDENCE, 7, 23; FORCIBLE ENTRY AND DETAINER; LIMITATIONS, STATUTE OF, 1; MECHANIC'S LIEN, 3, 4. 6; PARTY WALL, 2; PRINCIPAL AND AGENT; SAVINGS BANK; TRUST AND TRUSTEE.

MOTION.

See EXECUTION; SUPERIOR COURT.

MOTION TO DISMISS.

See MALICIOUS PROSECUTION.

MUNICIPAL CORPORATION.

See CITY; TOWN.

MUNICIPAL COURT.

See MALICIOUS PROSECUTION.

NEGLIGENCE.

1. The plaintiff, a yard-master in the freight-yard of the defendant, and familiar with the yard, and with the speed and direction of trains accustomed to pass through it, for the purpose of giving orders to some workmen, attempted to cross the railroad tracks about six hundred feet in front of a rapidly approaching train which he saw, and in so doing caught his foot under some unboxed wires near the rails and a few inches above the surface of the ground which were a part of the mechanism of an interlocking signal system then in process of construction, and fell so close to the train that he received a shock by its passing him as well as was injured by the fall. The plaintiff was aware of the position of the wires, which to his knowledge had been for nearly two weeks in the same position and condition, and the orders which he was about to give did not call for such haste that he could not have waited for the train to pass before crossing the tracks. *Held*, that the plaintiff voluntarily and needlessly incurred an obvious risk, and that he was not in the exercise of due care. *Horne v. Old Colony Railroad*, 180.

2. A lineman employed by a telephone company having, for the purpose of affixing wires of the company to a standard erected on the roof of a building by an electric lighting company, an implied license to reach the roof by going up through the building, who uses a different way, and, while unnecessarily upon the roof of an adjoining building, sustains injuries from contact with an uninsulated wire charged with electricity belonging to the electric lighting company, is not acting within the scope of his license, and is not entitled to recover. *Hector v. Boston Electric Light Co.* 558.
3. When several corporations use the structures owned by one of them as supports for separate lines of wire each carrying dangerous currents of electricity, it is the duty of the owner of the structures, at common law, in the absence of any agreement on the subject other than such as is involved in its permission to the others to use such structures on payment of compensation, to exercise reasonable care in seeing that its wires are kept, so far as is practicable, in a safe condition at such places as the servants of the others are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to such structures. *Illingsworth v. Boston Electric Light Co.* 583.
4. The plaintiff was employed in the fire alarm service of the city of Boston, which, under an agreement with an electric lighting company, used the structures owned by the company as supports for its lines of wire. There was evidence that, while the plaintiff in the performance of his duties was descending from one of such structures, his pliers which he carried in his belt caught on a wire belonging to the company, and that in reaching around to clear them he received injuries by the contact of his hand with a joint of the wires left without insulation at a point within twelve or fifteen inches of the structure. *Held*, in an action against the company, that the defendant was negligent in leaving the joints of its wires without insulation at such a point, and that the catching of the plaintiff's pliers, or his reaching around to clear them, did not necessarily show negligence, and that the question whether he was in the exercise of due care should have been submitted to the jury. *Held, also*, that, as the plaintiff was not a servant of the defendant, it could not be said that he took the risk unless he knew of it and voluntarily exposed himself to it. *Ibid.*
5. Although mere contact with one wire charged with electricity which is bare and uninsulated may cause no injury unless other conditions supervene, yet the fact, if it be true, that other circumstances must occur to render such contact dangerous cannot excuse the company or persons operating the wires from taking reasonable care to have them properly insulated at points where the servants of others have the right of coming near to or in contact with the wires. *Ibid.*
6. The plaintiff, who was driving a safe horse attached to a buggy, approached a crossing at grade of the highway with the tracks of a railroad, with which locality he was perfectly familiar. A traveller coming from that direction could see a train for half a mile before he reached a bend in the road, after passing which he could see, sitting in a carriage, some portion of the train until he got within one hundred and four feet of the tracks, when the train was lost sight of during a space of fifty-six feet, and

then again came into full view. No train was then due, according to schedule time, but an express train was late. As the plaintiff rounded the bend in the road he looked up the tracks, but saw no train. He knew that for ten years there had been a flagman at the crossing, and that the flagman's wife was accustomed to use the flag. When within thirty to fifty feet of the tracks he first saw the train coming, although he had looked again, and had heard no bell rung or whistle sounded. He saw the flagman's wife at the crossing, but she had no flag and made no signal for him to stop. There was an embankment on each side of the road. He thereupon whipped his horse and got across the tracks, the train passing behind him within about ten feet. The horse then became frightened by the whistle which was sounded, and broke, throwing out the driver and injuring him. *Held*, in an action against the railroad corporation for his injury, that it could not be said, as matter of law, that the plaintiff was negligent at any time before he saw the train; and that upon the question whether he exercised due care in what he did afterwards he was entitled to go to the jury. *Robbins v. Fitchburg Railroad*, 145.

7. The plaintiff, who was a passenger on an open electric car, desiring to leave it, motioned for that purpose to the conductor, who gave a signal to the motorman, and the car was slowed up gradually until it stopped at a regular stopping place with the rear platform several feet beyond the crossing of an intersecting street, as required by a regulation of the board of aldermen, and opposite a place in the street upon which it was travelling where the street pavement had been removed, and the foundation of a new road-bed consisting of rubble and cement covered with sand had been laid, but where, the paving blocks not having then been laid, there remained an excavation about six inches in depth. When the car stopped the plaintiff arose from his seat on the right-hand side of the car, took hold of the handle of the seat with his right hand, put his right foot on the running board and his left foot toward the ground, and, glancing around for approaching carriages, but not looking to see where he was stepping, stepped off into the unpaved part of the street and fell on his left side. The accident occurred in the middle of the forenoon, and there was nothing to prevent him from seeing the excavation if he had looked down, or to prevent him from alighting on the other side of the car where the pavement was in place. *Held*, that there was no evidence of negligence on the part of the defendant. *Bigelow v. West End Street Railway*, 393.
8. The plaintiff, who was employed by the defendant on a steam tug which was engaged by daylight in towing a barge, while looking out for the bow line of the tug was ordered by the captain to look out for the stern line. In responding in haste to the order he stepped with one foot on the iron cover or grating of a lazarette or round hole in the deck where he had to stand to reach the stern line, and the cover or grating slipped partially off and tipped, letting one of his feet into the hole and injuring him. The plaintiff testified that in the course of his duty he was obliged to look out for the stern line more than once a day; that he knew that the cover or grating, on account of accumulated rust and wear, would slip, but that he had never before known it to tip; that it was his duty to take off and put

on the cover of the lazarette, and that he had frequently done so, sometimes several times a day, for a period of eight months previous to the accident; and that during that time the cover had been in the same condition, ordinary wear and tear excepted, and that he was aware of its condition, but of this there was no evidence that he had ever made complaint to any one. *Held*, that the plaintiff was not in the exercise of due care, and that he was not entitled to recover. *Watts v. Boston Tow-Boat Co.* 378.

9. At the trial of an action for personal injuries, it appeared that the plaintiff was employed in a building in process of erection where, in unloading bricks to be used in its construction, it was the practice for the defendant's teamster to stop his wagon near to the sidewalk in front of the building, and then to place planks with one end resting on the floor of the building and the other end on the floor of the wagon, making a level platform on which some man would stand while the teamster tossed the bricks from the wagon to him, who in turn tossed them to another man inside the building; that the plaintiff was familiar with this method of unloading and piling the bricks; that on the occasion of the accident he saw the teamster drive up, and noticed that he threw the reins loosely over the seat, and did not hitch or put any weight to the horses, or put anything under the wheels; and that the horses, which the defendant's agent was praising to a bystander, were fine horses and were restless, and had not been used to draw a load to that place before, and had two weeks previously been brought from the West and purchased by the defendant at auction. The plaintiff and the teamster placed the planks between the wagon and the building in the manner described, and the plaintiff went upon them and began to receive bricks from the teamster, who stood in the front part of the wagon with his back to the horses, and to toss them to the next man. While so engaged, the plaintiff was thrown down by the starting of the horses. *Held*, that the risk of such an accident was obvious, and that the plaintiff could not hold another responsible for it, when he, appreciating the danger, voluntarily placed himself where he was liable to be injured in consequence of it. *KNOWLTON, J. dissenting. Goddard v. McIntosh*, 253.

See ACCIDENT INSURANCE; ACTION, 4-7; CITY; DOG; EMPLOYERS' LIABILITY ACT; EVIDENCE, 1, 13-16; HIGHWAY, 2; LAW OF THE ROAD; MASTER AND SERVANT; MORTGAGE, 2; PASSENGER; RAILROAD, 4; STREET RAILWAY; TELEGRAPH AND TELEPHONE COMPANIES; WARRANTY.

NEW TRIAL.

See EXCEPTIONS, 7.

NOTICE.

See CONTRACT, 4, 6; EQUITY, 13; FIRES; GUARANTY, 3-5; LANDLORD AND TENANT; MORTGAGE, 2, 4, 6; PROMISSORY NOTE, 2, 3.

NUISANCE.

See EVIDENCE, 2-4, 21; GAMING; INTOXICATING LIQUORS, 1.

OFFICER.

See ACTION, 4; ARREST.

PARENT AND CHILD.

See CONSTITUTIONAL LAW, 1; HABEAS CORPUS, 1.

PARTIES.

See ASSIGNMENT, 4; GRADE CROSSING, 4, 5; HABEAS CORPUS, 2.

PARTNERSHIP.

See FOREIGN CORPORATION, 3; LEASE, 3; PROMISSORY NOTE, 2, 3;
TRUSTEE PROCESS; VERDICT, 3.

PARTY WALL.

1. The original owner of two adjoining lots of land built houses thereon with a party wall between them, and afterwards sold the two houses to different purchasers, imposing no obligation upon either purchaser in respect to the party wall. A predecessor in title of the plaintiff, being the owner of one of the lots, strengthened the foundation, and built the party wall higher. The defendant, owning the adjoining lot, built his house higher, and used the wall so built by the plaintiff's predecessor in title. After this had been done the plaintiff bought his lot, and sought to make the defendant pay for such use of the wall. *Held*, that in the absence of a stipulation or agreement that such payment should be made a contract therefor could not be implied, and that the defendant had a right to use so much of the party wall as stood upon his own land without paying for such use. *Allen v. Evans*, 485.
2. In a written agreement between adjoining owners of land that when any portion of a party wall built by either of them "shall be used by the party or by the heirs or assigns of the party by whom the portion of the wall so used was not constructed, he or they shall pay to the party who constructed the same, or to his heirs or assigns, owners of the said premises, one half of the actual cost of the portion of the wall . . . so used by him or them," using the wall means making use of it in the process of the construction of a house on the adjoining lot, and the person using it is the builder of the house, and under such an agreement neither a grantee nor mortgagee of the builder is liable for the cost of the wall so made use of by him. *Pfeiffer v. Matthews*, 487.

PASSENGER.

1. In the absence of knowledge that only one safe path has been provided by a railroad corporation for leaving a passenger station, and of any notice or direction to take a particular path, a passenger may use any path which appears to be designed and used as a way to the street, and as to him the corporation is bound to see that all such paths are reasonably safe. *Cazneau v. Fitchburg Railroad*, 355.
2. If a person, for the sole purpose of continuing his homeward journey on foot, knowingly and voluntarily leaves a railroad train, which has stopped at a place not designed for the discharge of passengers, a short distance from the station for transportation to which he has paid fare, to await the passing of an express train approaching from the opposite direction, and the name of the station is not called, nor any express or implied invitation given to passengers to leave the train, he ceases to be a passenger; and if, in crossing the railroad tracks, he is killed by the other train, no action can be maintained, under Pub. Sts. c. 112, § 212, by the administrator of his estate against the railroad corporation for causing his death. *Buckley v. Old Colony Railroad*, 26.
3. A person who is struck and killed while running very rapidly from the direction of a public street in S. across the premises of a railroad corporation, outside of the passenger station, and across a track on which is an approaching train, apparently with a view to taking another train which is about to start for B. on the track beyond, is not a passenger for whose death an action can be maintained under Pub. Sts. c. 112, § 212, although at the time of his death he had in his pocket a ten-trip ticket which entitled him to ride over the railroad between B. and the station in S. where the accident occurred. *Webster v. Fitchburg Railroad*, 298.

See NEGLIGENCE, 7; RAILROAD, 4.

PATENT.

See CONTRACT, 2.

PAYMENT.

See DEVISE AND LEGACY, 3; EMINENT DOMAIN, 3; EQUITY, 12, 13; EVIDENCE, 23; FRAUDS, STATUTE OF, 5; GUARANTY, 5, 6; LIMITATIONS, STATUTE OF, 3; MECHANIC'S LIEN, 6, 7; MORTGAGE, 2-5; PRINCIPAL AND AGENT; PROMISSORY NOTE, 1.

PETITION.

See FOREIGN CORPORATION, 2; MECHANIC'S LIEN, 2; PROBATE COURT; TOWN, 2.

PLEADING.

See ACTION, 1, 2; AUDITA QUERELA, 1; COMPLAINT; EQUITY, 7; EXCEPTIONS, 6; FRAUDS, STATUTE OF, 3; FRAUDULENT REPRESENTATIONS, 3, 4, 7; JUDGMENT; MECHANIC'S LIEN, 2; TRUSTEE PROCESS, 1; VARIANCE; VERDICT, 4.

PLEDGE.

See BENEFICIARY ASSOCIATION, 3.

POLICE COURT.

See MALICIOUS PROSECUTION; POOR DEBTOR.

POOLS.

See FOREIGN LAWS, 6.

POOR DEBTOR.

The St. 1893, c. 396, was not intended to affect the jurisdiction of district and police courts in proceedings for the relief of poor debtors; and a writ of prohibition will not issue to restrain the justice of a police court from examining a debtor arrested on execution, who has made application to him for a notice of his desire to take the oath for the relief of poor debtors, on the ground that the certificate authorizing his arrest and under which he had entered into a recognizance was issued by a district court of the same county within the judicial district of which neither the debtor nor creditor lived or had their usual place of business. *Collins v. Kennedy*, 440.

POST OFFICE.

See GUARANTY, 4.

PRACTICE.

See ABATEMENT; APPEAL; ARREST; ASSESSOR; AUDITA QUERELA; CASE STATED; DEPOSITION; EQUITY, 8-13; EVIDENCE, 12; EXCEPTIONS; EXECUTION; HABEAS CORPUS, 2, 3; JUDGMENT; PROBATE COURT; RECEIVER; SUPERIOR COURT; TRIAL; VARIANCE; VERDICT; WITNESS; WRIT OF ENTRY, 1.

PREFERENCE.

See EQUITY, 4.

PRESCRIPTION.

See ADVERSE POSSESSION.

PRESUMPTION.

See EVIDENCE, 23; FOREIGN LAWS, 1, 3.

PRINCIPAL AND AGENT.

Upon a bill in equity for the cancellation of a mortgage and a note secured thereby, which were obtained from the plaintiff by A., and assigned by the mortgagee, at A.'s request, without the plaintiff's knowledge, to the defendant, if the question whether A. was the defendant's agent, and as such agent received and collected from the plaintiff the principal and interest of the mortgage, is raised by the pleadings, and the facts reported by the justice of the Superior Court who heard the case, without determining it, are as consistent with the theory that A., in making payments of interest to the defendant, was acting for the plaintiff or for himself, as that he was an agent of the defendant, the plaintiff fails to sustain the burden of proving that the payments to A. were in effect payments to the defendant. *Mulcahy v. Fenwick*, 164.

See ACTION, 6; CONTRACT, 2; EMINENT DOMAIN, 2; FORCIBLE ENTRY AND DETAINER; FRAUDULENT REPRESENTATIONS, 5, 6; MECHANIC'S LIEN, 5; MORTGAGE, 3, 5; SAVINGS BANK.

PRINCIPAL AND INCOME.

See DEVISE AND LEGACY, 6; ESTATES OF PERSONS DECEASED, 3-5.

PROBATE COURT.

On a bill in equity to compel the specific performance of an agreement to purchase land, it appeared that the plaintiff, on the petition under Pub. Sts. c. 120, §§ 19, 20, of a person in possession of land subject to a contingent remainder, was appointed by the Probate Court a trustee to sell the land. The petition was signed by the petitioner's attorney, and recited that he had an "estate in possession in about three quarters of an acre of land, be the same more or less, situated south of N. Street in the town of C., . . . subject to various contingent remainders under the will of M., late of said C., deceased." It further appeared that the appointment of the guardian *ad litem* and next friend to represent the possible issue of the petitioner was not made until after the decree appointing the trustee and authorizing the sale. *Held*, that the petition was properly signed by the petitioner's attorney; that the description of the premises in the petition was insufficient; that the appointment of the guardian *ad litem* should have been made before the entry of the decree appointing the trustee and authorizing the sale, and that Pub. Sts. c. 142, § 18, did not apply, for the reason that the premises were not "held by one who purchased them in good faith" under the probate proceedings. *Pratt v. Bates*, 315.

See CASE STATED, 2; EQUITY, 2, 3; ESTATES OF PERSONS DECEASED, 1, 2, 5.

PROHIBITION.
See POOR DEBTOR.

PROMISSORY NOTE.

1. Payment of a promissory note before maturity is a personal defence. *Watson v. Wyman*, 96.
2. If by a private agreement the authority of one partner to borrow money for a firm is limited to loans on notes payable to and indorsed by the other partner, and a bank has discounted such notes for the firm, the form of the notes is material but not conclusive evidence upon the question whether the bank should be charged with notice of the limitation of authority in a suit brought by it on a subsequent note made payable to the bank and secured by collaterals. *International Trust Co. v. Wilson*, 80.
3. If the president of a bank has noticed indications in the bank account of a firm that the firm was not prosperous, and had seen one member of the firm, who carried on its business in Boston, the worse for liquor, and knew that the other member of the firm resided in another city and paid but little attention to the business of the firm, these are suspicious circumstances, but consistent with good faith in taking a note of the firm for value before maturity, and are not enough to justify charging the bank with notice of any infirmity or taint in the transaction. *Ibid*.

See FOREIGN LAWS, 6; FRAUDS, STATUTE OF, 4, 5; GIFT;
GUARANTY, 1, 5, 6; MORTGAGE, 3-7.

PUBLIC CHARITY.

1. A bequest "to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of the city of B. and vicinity," is a valid bequest to a public charity. *McAlister v. Burgess*, 269.
2. A bequest of a fund to be distributed "among and applied to such objects and purposes of benevolence or charity, public or private, including educational or charitable institutions and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof," is a good public charitable bequest. *Weber v. Bryant*, 400.

PUBLIC OFFICER.

See ACTION, 5, 6; HIGHWAY, 2.

RAILROAD.

1. The Pub. Sts. c. 112, do not authorize a filing by a railroad corporation of a location including land more than five rods in width without authority from the county commissioners. *Wilder v. Boston & Albany Railroad*, 387.
2. Where the consolidation of two railroad companies has been authorized by legislative authority, a dissenting stockholder cannot maintain a claim

for better terms than those given by the vote of consolidation, if such vote was by a majority of the stockholders of each company acting in good faith and within such legislative authority. *Hale v. Cheshire Railroad*, 443.

3. The provisions of Pub. Sts. c. 105, §§ 41, 42, as to the ordinary liquidation or winding up of the affairs of a corporation, do not apply to the consolidation of two railroad companies under legislative sanction. *Ibid*.
 4. A passenger over a railroad, on arriving at his destination late in the evening, left his trunk to be placed in the baggage-room of the railroad station until the next day. During the night it was destroyed by a fire which originated in an accumulation of oily waste on the floor of a closet in the corner of the baggage-room. *Held*, that the storage of the trunk, which was strictly personal baggage, being free, under a regulation of the railroad company, for the first twenty-four hours after it was received, was to be considered as paid for by the payment of the passenger's fare, and that the liability of the defendant therefor was that of a warehouseman or bailee for hire, and that it was a question for the jury whether the baggage-room was kept by the defendant or its servants in a reasonably safe condition for the storage of baggage. *Nealand v. Boston & Maine Railroad*, 67.
- See ACCIDENT INSURANCE, 3; ADVERSE POSSESSION; CONSTITUTIONAL LAW, 3; EVIDENCE, 22; FRAUDULENT REPRESENTATIONS, 2, 3, 6; GRADE CROSSING; LICENSE; MASTER AND SERVANT, 12, 13; NEGLIGENCE, 1, 6; PASSENGER; STREET RAILWAY.

RATIFICATION.

See BENEFICIARY ASSOCIATION, 4; CORPORATION; ESTATES OF PERSONS DECEASED, 3; GUARANTY, 6; MECHANIC'S LIEN, 5; SAVINGS BANK.

REAL ESTATE.

See ADVERSE POSSESSION; CASE STATED, 2; ESTATES OF PERSONS DECEASED, 1, 3, 4; FRAUDS, STATUTE OF, 1-3; HOMESTEAD; LEASE; WRIT OF ENTRY.

RECEIVER.

1. The filing of a bill in this Commonwealth against a corporation, and the appointment of a receiver therefor, do not dissolve valid attachments of its property theretofore made, whether in this Commonwealth or elsewhere. *Garham v. Mutual Aid Society*, 357.
2. An attachment of the property of a corporation, if valid when made, is not discharged by the subsequent filing of a bill and the appointment of a receiver of the corporation; and if the funds attached have been paid over to the receiver by the order of the court without prejudice to the rights of the attaching parties, the receiver takes the property subject to all valid attachments. *Kittredge v. Osgood*, 384.

poration before the bill is filed, nor do such suits abate in consequence of such appointment, but the receiver may appear in and defend the suits if the interests which he represents render it proper or necessary. *Kittredge v. Osgood*, 384.

4. A receiver appointed by a court of equity in a foreign jurisdiction, to whom an insolvent corporation organized under the laws of that jurisdiction, its officers and agents, are ordered to assign and deliver all its property and effects, and have assigned and delivered them accordingly, is in effect an assignee of such corporation; and, if he acts under a court of competent jurisdiction of the State by which the corporation was created, and in which its principal offices are situated and its principal business is carried on, he has a standing to intervene in and be heard on a proceeding in this Commonwealth for the appointment of a receiver of the property of the corporation found here. *Buswell v. Order of the Iron Hall*, 224.

See ASSIGNMENT, 4; BENEFICIARY ASSOCIATION, 1, 4; FOREIGN CORPORATION; SPECIFIC PERFORMANCE, 1.

RECORD.

See APPEAL, 1; DEED; EVIDENCE, 22; WITNESS, 1.

REDEMPTION.

See EQUITY, 12, 13; MORTGAGE, 7.

REGISTRY OF DEEDS.

See DEED; MECHANIC'S LIEN, 5.

REMAINDER.

See DEVISE AND LEGACY, 1, 2, 4, 5.

RENT.

See LEASE, 3.

REPLEVIN.

See TROVER, 2.

REPORT.

See ASSESSOR, 1; PRINCIPAL AND AGENT.

RESERVATION.

See LEASE, 1.

RESIDENCE.

See BENEFICIARY ASSOCIATION, 1; DOMICIL.

REVIEW.

The liability of obligors on a bond given to dissolve an attachment ceases when the original judgment is vacated upon petition for review under Pub. Sts. c. 187, §§ 17-20. *Dresser v. Cutter*, 301.

REVOCATION.

See LICENSE.

RULES OF COURT.

See DEPOSITION, 2; SUPERIOR COURT.

SALE.

1. In a commercial contract for the sale and delivery of a cargo of coal, there is an implied warranty that it shall be of merchantable quality. *Alden v. Hart*, 576.
2. If it be assumed that in a commercial contract for the sale and delivery of a cargo of coal the title to the coal passed to the vendee when it was selected by the vendor, laden on board a barge designated by the vendee, and bills of lading therefor were given to the vendor under which the cargo was to be delivered to the vendee, he paying the freight, such a title was conditional on the coal being found to be of the quality purchased, and, if upon examination the coal did not conform to the implied warranty that it was merchantable, the vendee was entitled to reject it. *Ibid*.
3. In a commercial contract for the sale and delivery of a cargo of coal laden on board a barge designated by the vendee, the only bill of lading received by the vendee was one to which the captain of the barge was entitled, and which, he having sailed before it was completed, was forwarded for his use to the consignee, who was the vendor, and by him sent with the invoice to the vendee. The captain, on arrival, demanded the bill of lading of the vendee, who delivered it to him, after having made upon it the customary indorsements of the arrival of the barge ready to discharge, and of its afterward being towed from the vendee's wharf and anchored in the stream. The vendee immediately upon the arrival of the barge examined the cargo, found it unsatisfactory, and gave notice to the vendor that he refused to receive it, and the vendor, upon examination, admitting it to be unsatisfactory, attempted to dispose of it elsewhere. *Held*, that, assuming the title to the coal to have passed to the vendee, subject to examination and acceptance or rejection by him, he had done everything necessary to a rescission of the contract. *Ibid*.

See ACTION, 1, 2; CASE STATED, 2; COMPLAINT; CONTRACT, 2, 7; ESTATES OF PERSONS DECEASED, 1; EVIDENCE, 2, 21; MORTGAGE, 1; PROBATE COURT; WARRANTY.

SAVINGS BANK.

The treasurer of a savings bank has authority to foreclose a mortgage to the bank when directed so to do by the board of investment, if not before by virtue of his office, and his conveyance of the land to a purchaser at a sale under a power contained in the mortgage, and his subsequent acceptance of a conveyance from his grantee, the mortgagee having authority to purchase at a sale, are merely incidental to the powers which existed, or were conferred upon him; and the bank, by accepting the deed and bringing an action to recover possession of the land, ratified his acts. *North Brookfield Savings Bank v. Flanders*, 335.

SCIRE FACIAS.

See TRUSTEE PROCESS, 1.

SEAMAN.

See MASTER AND SERVANT, 11.

SELECTMEN.

See GRADE CROSSING, 6; LICENSE.

SENTENCE.

See HOUSE OF CORRECTION.

SERVICE.

See FOREIGN JUDGMENT.

SET-OFF.

See ASSIGNMENT, 4.

SEWER.

The power given by St. 1885, c. 249, § 1, to the board of aldermen, to "take in fee for the city of Boston any land that they may deem necessary for" "the purposes of building and maintaining the system of sewers of said city, and discharging sewage therefrom," being a power to take the title in fee simple absolute to the land, a bill in equity cannot be maintained by a person a part of whose land was so taken to restrain the city of Boston and the Metropolitan Sewerage Commission from the performance of a contract by which the city agreed to take into its sewer constructed through the land taken from the plaintiff the sewage of other cities and towns connected with the Metropolitan Sewerage system, on the ground of

a supposed possibility of reverter in the plaintiff in the land taken from him by the city, or on the further ground that his remaining land will be seriously injured by the proposed increased use of the city's sewer. *Titus v. Boston*, 209.

SHIPS AND SHIPPING.

See MASTER AND SERVANT, 11; NEGLIGENCE, 8.

SIGNATURE.

See MECHANIC'S LIEN, 5.

SPECIFIC PERFORMANCE.

1. A receiver was appointed of a fraternal beneficiary corporation which held an unexpired lease containing a provision that the lessee should not assign or let it for any more hazardous use, nor make any material alterations or additions other than those specified in the lease without the consent in writing of the lessor. On December 17, 1892, after the appointment of the receiver, A. offered in writing to purchase from him, for a stipulated price, the unexpired term. The receiver in writing accepted this offer "subject to obtaining the assent of B. [the lessor], and of the court if necessary." Prior to December 20, the lessor had orally consented to an assignment of the lease, but on December 23 he said to the receiver that he would not consent to such assignment. On December 28, the court gave its assent to the sale of the unexpired term by the receiver. The assent in writing of the lessor was never obtained, and on December 30 he gave to the receiver formal notice that the lease had been violated by the making of unauthorized alterations, but subsequently accepted rent from the receiver. *Held*, on a bill in equity for specific performance of A.'s agreement to purchase the unexpired term, and to compel B. to assent to its assignment, that, B. not having assented to the assignment of the term, A. was not bound to accept it. *Held, also*, that, A. not being bound at the time of filing the bill to accept the term, it could not avail the complainant if B. by a decree should be compelled to assent to the assignment of the lease. *Putnam v. Grace*, 237.
2. If the form of a contract is such that the defendant has bound himself absolutely, and the plaintiff has not, a court of equity will be slow to lend its aid to enforce such a contract in favor of the party who is not bound, and if, at the time of bringing his bill, the plaintiff is not bound to convey, equity will not ordinarily compel a defendant under such circumstances to accept a title. *Ibid*.

See EQUITY, 5, 6; PROBATE COURT.

STATE PRISON.

See HOUSE OF CORRECTION.

STATUTE.

See ABATEMENT; ACTION, 6; ADVERSE POSSESSION; APPEAL, 2, 3; CASE STATED, 2; CITY; COMPOSITION WITH CREDITORS, 1; CONSTITUTIONAL LAW, 1-4; DEVISE AND LEGACY, 4; DOG; DOWER; EMINENT DOMAIN, 2, 3; EMPLOYERS' LIABILITY ACT, 1; EQUITY, 1-4; FIRES; FORCIBLE ENTRY AND DETAINER; FOREIGN CORPORATION, 3, 4; FOREIGN LAWS; FRAUDS, STATUTE OF, 1, 3-6; GAMING; GRADE CROSSING; HABEAS CORPUS, 1; HIGHWAY, 1; HOUSE OF CORRECTION; LIMITATIONS, STATUTE OF, 2; MECHANIC'S LIEN, 3-7; PASSENGER, 2, 3; POOR DEBTOR; PROBATE COURT; RAILROAD, 1, 3; REVIEW; SEWER; TAX; TELEGRAPH AND TELEPHONE COMPANIES; TRIAL, 2; WIRES; WRIT OF ENTRY, 1.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED, EXPOUNDED, ETC.

REVISED STATUTES OF THE UNITED STATES.

§§ 5108, 5112, 5116.	Bankruptcy	557
----------------------	------------	-----

STATUTES OF ARKANSAS.

1884, §§ 3834, 3835.	Insurance	424
----------------------	-----------	-----

REVISED STATUTES OF MAINE.

1883, c. 48, §§ 17-19.	Corporation	12
------------------------	-------------	----

STATUTES OF NEW HAMPSHIRE.

Gen. Laws, 1878, c. 152.	Corporation	361
--------------------------	-------------	-----

NEW YORK PENAL CODE.

§§ 351, 352.	Gaming	131
--------------	--------	-----

REVISED STATUTES OF NEW YORK.

§§ 28, 29.	Gaming	181
------------	--------	-----

STATUTES OF THE COMMONWEALTH.

1780, c. 47.	Writ of Audita Querela	330
1784, c. 72, § 4.	Writ of Habeas Corpus	48
1785, c. 69, § 2.	Divorce	111
— — §§ 3, 5, 7.	"	112

1791, c. 17, § 1.
 1804, c. 105, §§ 3, 5.
 1808, c. 80.
 1831, c. 81.
 1834, c. 172.
 1855, c. 215, §§ 15, 17.
 — c. 238.
 — c. 405, § 1.
 1857, c. 154.
 — c. 298, § 18.
 1858, c. 58.
 1859, c. 196.
 — — §§ 36, 38, 56.
 1861, c. 100.
 1872, c. 53.
 — c. 343, § 4.
 1874, c. 372.
 — — §§ 107, 182, 183.
 — c. 404.
 1875, c. 33.
 1879, c. 237.
 1881, c. 122.
 — c. 200, § 16.
 1882, c. 181.
 — — § 3.
 1883, c. 221.
 — c. 223, § 2.
 — — § 8.
 — — § 14.
 1884, c. 236.
 1885, c. 249, § 1.
 — c. 353, § 2.
 — c. 377, §§ 1, 3.
 — c. 384.
 — — §§ 3, 7, 8, 10, 11, 12.
 1886, c. 122, § 2.
 — c. 330.
 1887, c. 270.
 — — § 1, cl. 2.
 — c. 382.
 — c. 385.
 — c. 389, § 2.
 — c. 430.
 — c. 442.
 — c. 447.
 — c. 448, § 2.
 1888, c. 94.

Writ of Review	801
Supreme Judicial Court	49
Writ of Habeas Corpus	48
Corporation	265
Gaming	282
Intoxicating Liquors	63
Homestead	277
Nuisance	282
Evangelical Baptist Benevolent and Missionary Society	270
Homestead	277
Dower	142
Superior Court	50
Supreme Judicial Court	50
Railroad	285
"	389
Brookline	310
Railroad	286, 389
"	286
Indorser	89
Writ of Review	301
Forcible Entry and Detainer	337
Superior Court	33
Chelsea	369
Children	72
"	78
Electricity	436, 570, 585
Equity Jurisdiction	594
" "	595
" "	94
Insolvency	555
Boston	211
Insolvency	555
Suffolk County Court House	293
Courts	50
"	57
Suffolk County Court House	288
Children	72
Employers' Liability Act	368
" " "	170
Gas Commissioners	435
Gas Companies	433
Cheshire Railroad	444
Railroad	288
Poor Debtor	441
Public Officer	391
Gaming	281
Appeal	594

1888, c. 131.	
— c. 219.	
— c. 257, § 3.	
— c. 403.	
— c. 419.	
— c. 426, §§ 1-8.	
— ——— §§ 9, 10.	
— ——— § 12.	
— c. 429.	
— ——— § 13.	
1889, c. 415.	
— c. 429.	
— c. 439, § 4.	
1890, c. 321, § 2.	
— c. 360.	
— c. 404, § 1.	
— c. 428.	
— ——— § 1.	
— ——— §§ 3, 7.	
— c. 438.	
1891, c. 87, § 1.	
— c. 228.	
— cc. 271, 407.	
— c. 362.	
— c. 370, §§ 3, 12, 13, 18.	
1892, c. 419, § 138.	
— c. 435.	
1893, c. 281, § 7.	
— c. 396, §§ 12, 13.	
— c. 454.	
1894, c. 184.	

Brookline	310
Intoxicating Liquors	63
Entry Fee	596
Public Officer	391
Poor Debtor	441
Fire Escape	36
“	37
“	35
Beneficiary Association	365
“ “	396
Poor Debtor	441
Onset Street Railway	364
Sewage	211
Insolvency	233, 364
Entry Fee	596
Electricity	585
Railroad	33, 262
“	32, 264
“	33
Appeal	38
Entry Fee	596
Public Officer	391
Poor Debtor	441
Exceptions	50
Electricity	434
Statute	36
Beneficiary Association	229
Rockport Water Co.	279
District and Police Courts	441
Electricity	433
Poor Debtor	441

REVISED STATUTES.

c. 25, § 6.	Way	531
c. 39, §§ 54, 55.	Railroad	388
c. 60, § 6.	Dower	142
c. 76, § 3.	Divorce	115
— § 38.	“	120
c. 81, §§ 11, 12, 13, 29, 30.	Supreme Judicial Court	49
c. 99, § 12.	Writ of Review	301
c. 111, §§ 3, 4, 6, 7, 8, 9, 18.	Writ of Habeas Corpus	48

GENERAL STATUTES.

c. 44, §§ 19, 20.	Way	531
c. 63, §§ 17, 19.	Railroad	389
— § 20.	“	390

c. 90, §§ 6, 7.	Dower	142
c. 104, § 3.	Homestead	277
c. 105, § 3.	Statute of Frauds	20
c. 144, §§ 3, 5, 16, 24.	Writ of Habeas Corpus	48
c. 146, § 29.	Writ of Review	301

PUBLIC STATUTES.

c. 11, § 20, cl. 1.	Tax	326
— — — — — cls. 1, 7.	"	9
c. 39, §§ 1-3.	Charitable Bequest	271
c. 48, § 18.	Children	70
c. 49, § 105.	Way	33
c. 52, §§ 15, 16.	"	531
c. 78, § 1.	Statute of Frauds	161, 251
— § 3.	" "	20
— § 5.	" "	326
c. 89, § 45.	State Industrial and Reform Schools	75
c. 99, § 10.	Gaming	281
c. 100.	Intoxicating Liquors	63
c. 101, § 6.	Nuisance	282
c. 102, § 93.	Dog	182, 184
c. 105, § 3.	Corporation	444
— § 41.	"	386
— §§ 41, 42.	"	445
c. 106, § 23.	"	438
c. 109, § 3.	Telegraph	436
— § 12.	"	570, 585
— §§ 16, 18.	"	558
c. 112, §§ 38-42.	Railroad	389
— §§ 45, 88, 89, 91, 92.	"	390
— § 212.	"	27, 299
— § 215.	"	287
c. 113, §§ 7, 40, 41.	Street Railway	416
— § 19.	" "	418
— §§ 39, 63.	" "	417
c. 120, §§ 19, 20.	Encumbered Estates	315
c. 123, § 3.	Homestead	277
— § 8.	"	278
c. 124, § 1.	Descent	460
— § 13.	"	352
— §§ 13, 14.	Dower	141
c. 133, § 6.	Estates of Deceased Persons	489
c. 136, §§ 9, 13.	" " "	420
c. 138, § 4.	Estates of Deceased Non-residents	233
c. 142, § 18.	Sale by License	319
c. 146, § 5.	Divorce	511
c. 147, §§ 33-35.	Husband and Wife	59

c. 150, § 8.	Supreme Judicial Court	48
—— § 9, 16, 17.	“ “ “	594
—— § 20.	“ “ “	50
—— § 30.	“ “ “	595
c. 151, § 2, cl. 11.	Equity Jurisdiction	59
—— § 3.	“ “	59
—— § 4.	“ “	417
—— §§ 13, 14, 15, 16.	“ “	595
c. 152, § 7.	Superior Court	595
—— § 10.	Appeal	57, 110
—— §§ 10, 12, 16.	“	594
c. 153, § 6.	Courts	48
—— § 8.	Exceptions	110
—— § 12.	“	50
—— § 15.	“	594
—— § 16.	“	595
c. 154, §§ 39, 40, 41.	Appeal	595
c. 156, §§ 7-10.	“	595
c. 157, § 26.	Insolvency	556
—— § 86.	“	557
—— § 96.	“	275
c. 159, §§ 3, 4.	Entry Fee	595
c. 161, § 12.	Venue of Actions	595
c. 162, §§ 17, 18, 20, 27, 28, 31, 34.	Poor Debtor	441
c. 163, § 12.	Bail	56
c. 167, § 2, cl. 3.	Declaration	456
c. 169, § 19.	Witness	66
—— § 71.	Evidence	180
c. 173, §§ 1-4, 6.	Judgment	98
c. 175, §§ 1, 7.	Forcible Entry and Detainer	337
c. 178, § 46.	Partition	595
c. 183, §§ 40-42.	Trustee Process	109
—— § 53.	“ “	288
c. 185, §§ 3, 4, 5, 7, 16.	Writ of Habeas Corpus	47
—— § 21.	“ “ “	48
c. 186, §§ 1-6.	Writ of Audita Querela	330
c. 187, §§ 17-20, 30.	Writ of Review	301
c. 191.	Mechanic's Lien	294, 461
—— §§ 1, 5.	“ “	461
—— §§ 6, 8, 36.	“ “	467
c. 192, § 32.	Lien	513
c. 199, § 4.	Entry Fee	566
c. 205, § 4.	Perjury	121
c. 207, § 1.	Abduction	122
c. 214, § 25.	Complaint	183
c. 215, §§ 3, 19, 20.	Sentence	121
—— § 23.	“	122
c. 220.	Imprisonment	391

STREET.

See CONSTITUTIONAL LAW, 3; GRADE CROSSING; HIGHWAY; LAW OF THE ROAD; LICENSE; WIRES.

STREET RAILWAY.

1. The question what is an "appearance of danger" within the meaning of section 25 of chapter 6 of the Revised Regulations of 1892 of the Board of Aldermen of the city of Boston, which provides that no person having control of a street car shall, "on the appearance of danger" to carriages or persons, "fail to stop the car in the shortest time and space possible," depends upon all the attendant circumstances, and usually must be left to the jury. *Doyle v. West End Street Railway*, 583.
2. In an action for personal injuries it appeared that, while the plaintiff and a man employed by him were pulling in a street on a rope attached to a tree on private land, the plaintiff was struck by an electric car of the defendant. The plaintiff objected to the judge's reference to the case of *Chisholm v. Old Colony Railroad*, 159 Mass. 8, as "instructive," and as "applicable in part," and not as conclusive. The jury were not instructed that the same rule applied to a railroad operated by steam, and to a street railway operated by electricity, but the judge remarked that "to some extent it is undoubtedly true that a motorman would have the right to assume that a person who was in the position of danger would withdraw from it, that he would hear the gong as sounded, and would take some other position," and the question was left to the jury, who were further instructed that, "if the motorman, had he been careful himself, should have seen that there was the appearance of danger, it was then his duty to stop the car as speedily as possible, and if he did not stop the car as speedily as possible, and because of the failure to stop it the plaintiff was injured, while the plaintiff was himself in the exercise of due care, the plaintiff is entitled to a verdict." The jury returned a verdict for the defendant. *Held*, that the plaintiff had no ground of exception. *Ibid*.

See EQUITY, 1; NEGLIGENCE, 7.

SUBSCRIPTION.

See CONTRACT, 4, 5; EVIDENCE, 5.

SUPERIOR COURT.

1. Under the 27th Rule of the Superior Court, providing that "on the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court," and an order passed by the court and addressed to the clerk, "that judgment be entered on the first Monday of every month . . . in all actions pending in said court

which are ripe for judgment," the clerk has no power to enter judgment in an action in which an appeal is pending from the disallowance of a motion to take off a default. *Norcross v. Crabtree*, 55.

2. Under the 27th rule of the Superior Court, providing that "on the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court," and a general order adopted thereunder "that judgment be entered on the first Monday of every month . . . in all actions pending in said court which are ripe for judgment," a case in which a suggestion of insolvency has been duly filed by the defendant with a motion for continuance, and a default has been entered for his non-appearance when the case was reached for trial, is not "ripe for judgment," if the motion for a continuance has not in fact been considered and passed upon by the court. *Hosmer v. Hoitt*, 173.

See ABATEMENT; APPEAL, 2, 3; ASSESSOR; CASE STATED, 2; COMPLAINT; DEPOSITION, 2; GRADE CROSSING, 5, 6; JUDGMENT.

SUPREME JUDICIAL COURT.

See APPEAL, 2, 3; ASSESSOR 1; CASE STATED, 2; EQUITY, 1, 8-11; ESTATES OF PERSONS DECEASED, 1; HABEAS CORPUS, 3; MECHANIC'S LIEN, 7.

SURETY.

See GUARANTY; LIMITATIONS, STATUTE OF, 2; TRUST AND TRUSTEE.

TAKING.

See CONSTITUTIONAL LAW, 6; EMINENT DOMAIN; EQUITY, 7.

TAX.

1. Debts due do not come within the description of goods, wares, merchandise, and other stock in trade, taxable under Pub. Sts. c. 11, § 20, cl. 1. *New York Biscuit Co. v. Cambridge*, 326.
2. If an executor keeps his testator's former shop open, and sells the goods therein, occasionally replenishing the stock with small purchases, although for the sole purpose of settling the estate and closing the business, the stock of goods is taxable to the executor, under Pub. Sts. c. 11, § 20, cl. 1, in the city where the shop is hired and the business carried on, although the testator last dwelt in another city. *Cotton v. Boston*, 8.

See WRIT OF ENTRY, 2, 4, 5.

TELEGRAPH AND TELEPHONE COMPANIES.

The St. 1883, c. 221, extending the laws as to the erection and laying of telegraph and telephone lines, except Pub. Sts. c. 109, §§ 16, 18, to lines for the transmission of electricity for the purpose of lighting, relates solely to the authority to erect, lay, and maintain such lines, and to the regulation

of such lines, and it does not relate to the liability of electric light companies for injuries received by any person from the posts, wires, or other apparatus of such companies. *Hector v. Boston Electric Light Co.* 558.

See NEGLIGENCE, 2-5; WIRES.

TENANT AT WILL.

See LANDLORD AND TENANT.

TITLE.

See CONFLICT OF LAWS; DEED; SALE, 2, 3; TROVER.

TORTS.

See ABUSE OF LEGAL PROCESS; ACTION, 4, 5, 7; COMPOSITION WITH CREDITORS, 2; FRAUDULENT REPRESENTATIONS; MASTER AND SERVANT; NEGLIGENCE; TROVER.

TOWN.

1. There is nothing in St. 1891, c. 370, indicating that, after a town has voted at two separate town meetings called as required by § 13 that it is expedient to exercise the authority conferred by the statute pursuant to § 3, any additional vote is necessary. *Citizens' Gas Light Co. v. Wakefield*, 432.
2. The specific property which a town is required to purchase in accordance with the provisions of St. 1891, c. 370, and the price, time, and other conditions of the sale, are to be determined by the commissioner or commissioners to be appointed under § 13; and if the poles for the support of the wires of an electric light company used in distributing electricity were not legally located, this would not entirely defeat the petition under the statute, and what effect it would have upon the property to be purchased or the price to be paid for it cannot be determined under such petition. *Ibid.*
3. The schedule of property under St. 1891, c. 370, is required for the purpose, not of furnishing such a formal description as may be necessary or proper in a conveyance, but of furnishing such information in detail to a city or town that the parties may intelligently negotiate for the purchase, or, if the parties cannot agree, of furnishing to the commissioners such a bill of particulars as may be necessary or convenient for an intelligent adjudication of the matters which they are to determine. *Ibid.*

See CONSTITUTIONAL LAW, 4, 5; CONTRACT, 3; CORPORATION; DAMAGES; EMINENT DOMAIN; EQUITY, 1, 7; GRADE CROSSING, 6.

TRESPASS.

See ACTION, 4; ARREST, 2; EVIDENCE, 22; LICENSE.

TRIAL.

1. If a request for instructions to the jury is incorrect when applied to some aspect of the case, it cannot properly be given. *Twomey v. Linnehan*, 91.
2. If, at the trial of an action, the jury are correctly instructed that certain facts, if proved, are a legal defence, the defendant is not harmed by the refusal to instruct the jury that those facts are also a defence under St. 1883, c. 223, § 14. *Ibid.*

See ARREST, 3; EXCEPTIONS, 3-8; WITNESS.

TROVER.

1. The title to property which has been converted is not transferred to the defendant by the entry of a judgment for the plaintiff in an action of trover and by a levy of the execution upon the property converted, but remains in the plaintiff until he has received actual satisfaction. *FIELD, C. J., HOLMES & KNOWLTON, JJ., dissenting. Miller v. Hyde*, 472.
2. A., living here, bought a horse through his agent B., who kept it for him in Connecticut. After the death of A. his administrator demanded the horse of B., who refused to deliver it to him, and afterwards sold it as his own property to C. A.'s administrator then brought an action of trover in Connecticut against B. and C., and attached the horse as the property of B. He recovered judgment against B. only, on which execution was issued and delivered to an officer, who, after an ineffectual demand on B. for its payment, levied on the horse, but before he had sold it the horse was replevied from him by C., and while C.'s suit was still pending in Connecticut, and while the judgment there against B. remained unsatisfied, the horse was brought into this Commonwealth by the agent of C., from whom it was replevied by the administrator of A. *Held*, that the title of the administrator of A. to the horse was not divested, nor his right of recovery barred, either by bringing the action, or by obtaining judgment against B., or by procuring the horse to be attached on mesne process or seized on execution as the property of B., and that he was not estopped thereby from maintaining the action of replevin in this Commonwealth. *Held, also*, that the pendency of the replevin suit in Connecticut between C. and the officer was not a bar or defence to the replevin suit here. *FIELD, C. J., HOLMES & KNOWLTON, JJ., dissenting. Ibid.*

See CONFLICT OF LAWS.

TRUST AND TRUSTEE.

It is an improper investment of a trust fund for a trustee to buy of himself with it a mortgage of real estate which is worth less than the amount of the fund so invested, and the subsequent conduct of the *cestui que trust*, influenced by the false representations of the trustee as to the value of the property, in authorizing the trustee to bid off the property for him at a foreclosure sale, and in accepting a conveyance of it to prevent a sacrifice, and, upon learning the facts, in demanding that the trustee should take

such as property, and account for the same invested in the mortgage, and repudiation of the transaction, and not an exoneration of the sureties upon the bond of the trustee. *McKim v. Glover*, 418.

See ASSIGNMENT, 4; CASE STATED, 2; DEVISE AND LEGACY, 1, 4, 6-8; EQUITY, 5, 6; ESTATES OF PERSONS DECEASED; FOREIGN CORPORATION, 2; LIMITATIONS, STATUTE OF, 2; PROBATE COURT; PUBLIC CHARITY, 2.

TRUST COMPANY.

See BENEFICIARY ASSOCIATION, 3, 4.

TRUSTEE PROCESS.

1. The fact that a person charged as trustee is indebted to the defendant and another jointly as copartners is not matter of abatement to be pleaded by the alleged trustee in the original action, but may be pleaded in answer to a *scire facias* against him. *Stillings v. Young*, 287.
2. A person from whom money is due to a partnership is not chargeable as trustee in an action against one of the partners. *Ibid.*

See EVIDENCE, 8.

TRUST FUND.

See DEVISE AND LEGACY, 4, 7, 8; ESTATES OF PERSONS DECEASED, 4, 5; TRUST AND TRUSTEE.

VARIANCE.

A person cannot, in order to show that he has a cause of action for the breach of a certain contract, prove a provision of a later and substituted contract, by which the time limited for the performance of his part of the original contract has been extended, unless he avers this provision of the new contract in his declaration, and if he declares only on the original contract he cannot rely as a cause of action upon a breach of the new agreement, as in such a case there would be a variance between the allegation and the proof. *King v. Faist*, 449.

See EXECUTION; LARCENY, 1.

VERDICT.

1. Where a jury have returned findings upon questions submitted, but have separated without agreeing on a verdict, the presiding justice may nevertheless order a verdict if upon the findings and the whole evidence either party has a clear right in law to a verdict. *International Trust Co. v. Wilson*, 80.
2. If the foreman of the jury, at the trial of a writ entry, to whom is given two printed forms of verdict differing only in the fact that one contains the word "not," by mistake signs the wrong form, and the mistake, which

is naturally suggested to the judge by the inconsistency of the verdict with the answer to a question submitted with the verdict, is made certain by the answer of the jury to an inquiry addressed to them by the judge, there is no error in allowing the jury, without again retiring, to amend the verdict, or in receiving and recording the verdict so amended. *Tromey v. Linnehan*, 91.

3. In an action for false and fraudulent representations a special finding of the jury that the defendants were partners renders immaterial any question as to the sufficiency of the evidence to warrant an instruction in regard to a possible combination or conspiracy of the defendants. *Holst v. Stewart*, 516.
4. Where the declaration contains a count in contract and another in tort, and both are alleged to be for the same cause of action, it is error for the jury to return a verdict for the plaintiff on both counts, and in such a case the plaintiff, as a condition of taking judgment on the finding, should be required to remit his verdict on one of the counts, and the judgment should then be rendered on the other. *Ibid.*

See INTOXICATING LIQUORS, 2; JUDGMENT.

WAIVER.

See ARREST, 1; ASSIGNMENT, 2; CASE STATED, 2; DEVISE AND LEGACY, 6.

WAREHOUSEMAN.

See RAILROAD, 4.

WARRANT.

See GAMING, 3.

WARRANTY.

If A. buys of B., an experienced manufacturer, with whom he has long dealt, an appliance which he is assured is the best for the purpose for which it is intended, which is of a kind that he has used before in his business, and which, while being used in the proper and ordinary manner in doing the work for which it is designed, breaks, by reason of a hidden flaw which could not have been detected upon a careful inspection, within two months after it is put in use, while in the ordinary course of wear it should have lasted for years, and the accident injures, while in the regular discharge of his duties and without his fault, a servant of A., who, without suit and without notice to B., compensates the servant for his injuries, A. cannot recover, in an action against B. for breach of warranty in the sale, the amount so paid as compensation to his servant. *Roughan v. Boston & Lockport Block Co.* 24.

See EXCEPTIONS, 5; FRAUDULENT REPRESENTATIONS; SALE.

WATER AND WATERCOURSE.

See CONSTITUTIONAL LAW, 5.

WATER COMPANY.

See EMINENT DOMAIN, 3.

WATER WORKS.

See CONSTITUTIONAL LAW, 5, 6; CONTRACT, 3; DAMAGES; EMINENT DOMAIN, 1, 2; EQUITY, 7.

WAY.

See CONSTITUTIONAL LAW, 3; GRADE CROSSING; HIGHWAY; LICENSE; PASSENGER, 1.

WELL.

See FRAUDULENT REPRESENTATIONS, 1.

WIDOW.

See DEVISE AND LEGACY, 5, 6; DOWER; EVIDENCE, 23; HOMESTEAD, 2, 3.

WILL.

See DEVISE AND LEGACY; ESTATES OF PERSONS DECEASED, 2-5; HOMESTEAD, 2; PUBLIC CHARITY.

WIRES.

In St. 1890, c. 404, § 1, requiring persons or corporations owning or operating a line of wires over streets or buildings in a city suitably and safely to attach the wires to strong and sufficient supports, the words "and insulate them at all points of attachment" mean at the point of attachment to the supports. *Illingsworth v. Boston Electric Light Co.* 583.

See EVIDENCE, 13; NEGLIGENCE, 1-5; TELEGRAPH AND TELEPHONE COMPANIES.

WITNESS.

1. The conviction of a witness of a crime cannot be shown to affect his credibility under Pub. Sts. c. 169, § 19, without producing the record thereof. *Commonwealth v. Sullivan*, 59.
2. It is competent to show, on re-examination of a witness, that a discrediting admission made by him on cross-examination was made by mistake. *Farrell v. Boston*, 106.

See EVIDENCE, 14, 19, 20.

WORDS.

- "After the decease of my wife." See *Burbank v. Sweeney*, 490, 494.
- "Any land belonging to or included within the location of any such railroad." See *Maney v. Providence & Worcester Railroad*, 283, 286.
- "Appearance of danger." See *Doyle v. West End Street Railway*, 533.
- "Appeared." See *Bingham v. Boston*, 3, 7.
- "As located and established." See *Maney v. Providence & Worcester Railroad*, 283, 285.
- "Assignment of policies." See *Hewins v. Baker*, 320, 325.
- "At the death of her mother." See *Sawyer v. Freeman*, 543, 547.
- "A view to give a preference." See *Ames v. Sheehan*, 274, 275.
- "Building." See *Durr v. Chase*, 40.
- "Champerous." See *Joy v. Metcalf*, 514.
- "Civil actions." See *Collins v. Kennedy*, 440, 441.
- "Church." See *McAlister v. Burgess*, 269, 271.
- "Contract." See *Batchelder v. Hutchinson*, 462, 466.
- "Creditor." See *Willard v. Briggs*, 58.
- "Creditors who have proved their claims." See *Fenton v. Graham*, 554, 557.
- "Due diligence for personal safety." See *Keene v. New England Mutual Accident Association*, 149.
- "During her lifetime." See *Burbank v. Sweeney*, 490, 493, 494.
- "Entry of every suit." See *Burlingame v. Bartlett*, 593, 596.
- "Fraternal beneficiary corporation." See *Garham v. Mutual Aid Society*, 357, 364.
- "Goods, wares, and merchandise." See *New York Biscuit Co. v. Cambridge*, 326.
- "Hearing on confirmation of the composition." See *Fenton v. Graham*, 554, 557.
- "Held by one who purchased them in good faith." See *Pratt v. Bates*, 315, 320.
- "I desire." See *Weber v. Bryant*, 400, 403.
- "Including." See *Weber v. Bryant*, 400, 403.
- "Income thereof then in her hands." See *Sawyer v. Freeman*, 543, 547, 549.
- "In substitution therefor." See *Norwood v. New York & New England Railroad*, 259, 264.
- "Insulate them at all points of attachment." See *Illingsworth v. Boston Electric Light Co.* 563.
- "Land or materials necessary for the purpose of making or securing their railroad." See *Wilder v. Boston & Albany Railroad*, 387, 389.
- "Like destruction." See *Hunnewell v. Bangs*, 132, 133.
- "Maintenance." See *Joy v. Metcalf*, 515.
- "Make no disposition of the same during her lifetime." See *Burbank v. Sweeney*, 490, 494.
- "Malice." See *Zinn v. Rice*, 571.
- "Matter of law." See *Buswell v. Fuller*, 220, 224.
- "Moneys." See *Iasigi v. Iasigi*, 75, 79.

- "Not disposed of as above." See *Burbank v. Sweeney*, 490, 493.
- "Notified in writing." See *Perry v. Bangs*, 35, 36.
- "On payment." See *Rockport Water Co. v. Rockport*, 279.
- "Others." See *Niles v. Almy*, 29, 30.
- "Passenger." See *Buckley v. Old Colony Railroad*, 26; *Webster v. Fitchburg Railroad*, 298.
- "Place." See *Commonwealth v. Warren*, 281.
- "Proper ways of egress, or other means of escape from fire." See *Perry v. Bangs*, 35, 38.
- "Railroad." See *Maney v. Providence & Worcester Railroad*, 283, 286.
- "Refused." See *Bertie v. Flagg*, 504, 506.
- "Remainder." See *Burbank v. Sweeney*, 490, 494.
- "Ripe for judgment." See *Norcross v. Crabtree*, 55; *Hosmer v. Hoitt*, 173.
- "Shall protect . . . from all infringements." See *Wiggin v. Consolidated Adjustable Shoe Co.* 597, 599.
- "Sole and exclusive sale of said shoes in said territory." See *Wiggin v. Consolidated Adjustable Shoe Co.* 597.
- "Such." See *Hunnewell v. Bangs*, 132, 133.
- "Superintendence." See *O'Brien v. Rideout*, 170.
- "The land belonging to such railroad." See *Maney v. Providence & Worcester Railroad*, 283, 286.
- "To dispose of as she may deem expedient." See *Burbank v. Sweeney*, 490, 492.
- "To take effect at her decease." See *Marsh v. Hoyt*, 459, 461.
- "To that end." See *Weber v. Bryant*, 400, 402.
- "Used." See *Pfeiffer v. Matthews*, 487.
- "Voluntary exposure to unnecessary danger." See *Keene v. New England Mutual Accident Association*, 149.
- "Walking or being on the road-bed." See *Piper v. Mercantile Mutual Accident Association*, 589, 590.
- "Without prejudice." See *Burtis v. Burtis*, 508.

WRIT.

See ARREST, 1; AUDITA QUERELA; EVIDENCE, 12; POOR DEBTOR.

WRIT OF ENTRY.

1. In order to maintain a writ of entry, it is not necessary to show an actual wrongful dispossession or exclusion of the demandant, or an adverse possession by the tenant; but, under Pub. Sts. c. 173, §§ 1-4, the demandant is required to prove only that he is entitled to such an estate as he claims, and that he has a right of entry, and if he proves such estate and right of entry he can recover, unless the tenant proves a better title in himself. *Twomey v. Linnehan*, 91.
2. At the trial of a writ of entry, one of the defences was that the demandant had bargained the locus to the tenants, and had agreed to convey the

title to them, and had put them in possession as part of the bargain, and had broken his agreement and refused to fulfil it, and had never since regained possession; and another defence was title in one of the tenants under a tax deed. The jury found specially that the tenants had agreed to pay the taxes until the purchase money should be paid. *Held*, that the tenants had no ground of exception to the refusal to instruct the jury that the sale for non-payment of taxes did not affect the rights that the tenants had under the original contract to purchase. *Twomey v. Linnehan*, 91.

3. At the trial of a writ of entry, one of the defences was that the tenant was in possession of the demanded premises under an agreement of sale by the demandant, who had broken his agreement and had not regained possession. The memorandum of sale did not purport to be signed by the demandant. The judge refused to instruct the jury, as requested by the tenant, that there was a sufficient memorandum under the statute of frauds, and, in the instructions given, did not rule that the demandant must have agreed to convey by a memorandum good under the statute. *Held*, that the tenant had no ground of exception. *Ibid*.
4. At the trial of a writ of entry, one of the defences pleaded by the tenants in a joint answer was title in one of the tenants under a tax deed. The tenants requested the judge to rule that, if the demandant was entitled to recover as against the tax title, he could only so recover against one of the tenants. *Held*, that this request was properly refused. *Ibid*.
5. The tenant in a writ of entry cannot maintain his defence by showing title in himself under a tax deed, if the tax sale was suffered or procured by him in violation of his agreement with the demandant to pay the tax. *Ibid*.

See EQUITY, 6; LIMITATIONS, STATUTE OF, 1; VERDICT, 2.

WRIT OF ERROR.

See HOUSE OF CORRECTION.

WRITTEN INSTRUMENTS.

See ACTION, 1-3; CONTRACT; EVIDENCE, 17-19; FRAUDS, STATUTE OF; LEASE; MORTGAGE.

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